UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 17

MIDWEST DIVISION - RMC, LLC, D/B/A
RESEARCH MEDICAL CENTER

and **Cases: 14-CA-287441**
14-CA-286571

NNOC – MISSOURI & KANSAS/NNU, AFL-CIO **14-CA-278811**

and

SERVICE EMPLOYEES INTERNATIONAL
UNION HCII, MISSOURI/KANSAS DIVISION

POST-HEARING BRIEF ON BEHALF OF RESPONDENT

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I. STATEMENT OF THE CASE

This matter was tried before Administrative Law Judge Christine Dibble on May 10-11, 2022 at the National Labor Relations Board, Region 17, located at 600 Farley Street, Suite 100, Overland Park, Kansas. Respondent Midwest Division – RMC, LLC d/b/a Research Medical Center (Hospital or RMC) is an acute care hospital in Kansas City, Missouri.

Service Employees International Union HCII, Missouri/Kansas Division (SEIU) represented a unit of technical employees, service and maintenance employees, excluding all other positions, at the Hospital. SEIU alleges the Hospital violated Section 8(a)(1) of the National Labor Relations Act ("NLRA" or "Act") based on conduct alleged to have occurred during a decertification election SEIU lost in a vote tally held on June 14, 2021.[12] SEIU also alleges the Hospital unlawfully withdrew recognition from SEIU after its membership voted to oust it as their bargaining representative and, thereafter, unlawfully refused to bargain with SEIU in violation of Section 8(a)(5).

California Nurses Association/National Nurses Organizing Committee (NNOC) represents a unit of all full-time, part-time and per diem Registered Nurses at the Hospital. NNOC alleges a single violation of the Act premised on the Hospital's refusal to allow Julie Perry (NNOC Representative) to attend a September 17 grievance meeting.

The General Counsel consolidated the above-referenced matters and issued a Consolidated Complaint on April 12, 2022 ("Complaint" hereinafter cited as ("Compl. ¶ __")).[3] The Hospital

[1] After a lengthy investigation, the Regional Director overruled all of SEIU's objections and certified the results on February 8, 2022. *See* Regional Director's Decision on Objections and Certification of Results, attached hereto as **Exhibit A**.

[2] All dates are from 2021, unless otherwise indicated.

[3] Prior to the hearing, the Hospital sought special permission to appeal Judge Amchan's denial of the Hospital's prior motion to sever the consolidated cases, which was denied. (Tr. 9-12).

timely answered the Complaint denying any violation of the Act. During trial, Counsel for the General Counsel voluntarily dismissed Paragraph 5(b) of the Complaint.

II. INTRODUCTION

This matter involves two consolidated cases and a scattershot Complaint alleging multiple, disjointed unfair labor practices by two different unions and virtually no overlapping evidence or witnesses. In its opening remarks, Counsel for the General Counsel proclaimed that the Hospital unlawfully withdrew recognition from SEIU after its membership unequivocally voted to decertify it as their exclusive bargaining representative and, moreover, claimed the decertification election, itself, was tainted by alleged unlawful conduct. Nothing could be further from the truth.

Election objections were filed by SEIU. The Hospital promptly responded fully to the objections on July 30. The Region spent a total of eight (8) months investigating the Hospital's alleged unlawful interference with the decertification election before overruling all of the Objections on February 8, 2022. Thereafter, Counsel for the General Counsel had months to prepare for trial. Tellingly, the evidence presented by Counsel for the General Counsel included nothing more than a few witnesses who unreliably testified in conclusory fashion about the Hospital's alleged misconduct and who entirely failed to substantiate the Complaint's allegations – a reality underscored by the Region's decision to overrule the objections and certify the election results. Indeed, the evidence at trial wholly fails to show any malfeasance by the Hospital with respect to the decertification election and, importantly, reveals that the Hospital's decision to withdraw recognition from, and refuse to bargain with, SEIU amounted to nothing more than a lawful choice to honor its employees' objectively apparent decision to decertify. In doing so, the Hospital did not automatically violate the Act; it merely proceeded at its own risk while it awaited the certification of results from the Regional Director. As the Region ultimately certified the results of the decertification election, the claims against the Hospital must be dismissed entirely.

Counsel for the General Counsel also weaved a desperate (and evolving) story in the entirely separate claim (and union) that the Hospital refused to allow a grievant her chosen representative during a non-mandatory Step 1 grievance meeting. But like many great stories, this claim – too – is built on exaggeration. The evidence at trial undeniably establishes that the Hospital did, in fact, permit the grievant to be accompanied by a representative of her choosing. What the Hospital disallowed, consistent with the NLRA and the parties' CBA, was NNOC's demand to allow additional parties to attend the meeting. Significantly, the Hospital gave the grievant the option of postponing or substituting her representative during the non-mandatory meeting. Notwithstanding, the grievant pressed forward.

Simply put, Counsel for the General Counsel has failed to prove the Hospital engaged in any conduct violating the NLRA and, given its failure to meet its burden of production and persuasion in these cases, the Complaint, as amended, should be dismissed in its entirety.

III. ARGUMENT AND CITATION TO AUTHORITY

A. Counsel for the General Counsel Bears the Burden of Proving that an Unfair Labor Practice Occurred

Critical to the analysis of this case is the actual application of the appropriate burden of proof. It is not enough to lodge a Complaint, make sweeping allegations, call a few witnesses, and claim victory. Rather, the mandatory burden of proof dictates that the General Counsel "bears the burden of persuasion as well as of production." *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 713 (2001) (internal citations omitted). That requires Counsel for the General Counsel to introduce evidence in support of each allegation of the Complaint and to establish by a preponderance of the evidence that a violation actually occurred. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393 (1983); 28 U.S.C. § 160(c).

Here, Counsel for the General Counsel failed to meet that burden. As set forth below, the witnesses it called were scarce and unreliable. Not surprisingly, their testimony was not corroborated despite the alleged presence of others who could have done so. Pertinent and necessary evidence to prove many allegations was simply missing and never discussed by anyone. Given that the very definition of "preponderance" demands showing a violation more likely occurred than not, Counsel for the General Counsel did not clear that hurdle. In other words, it is wholly insufficient to posit a violation may have occurred, might have occurred or possibly occurred, which is the best that can be said for the evidence (or lack thereof) herein. Accordingly, given that the Hospital's actions in this case were exceedingly measured, appropriate, and lawful, this Complaint should be dismissed in its entirety

B. The Hospital Lawfully Withdrew Recognition from SEIU and Lawfully Refused to Bargain With It Thereafter[4]

In the Complaint, Counsel for the General Counsel claims the Hospital violated Section 8(a)(5) of the Act by refusing to bargain with SEIU during the time between the decertification election vote count and the official certification of the results thereof. Specifically, Counsel for the General Counsel asserts that during that time, the Hospital unlawfully: (1) withdrew recognition from SEIU; (2) refused to bargain over PRN rates; (3) refused to process dues deductions; (4) prohibited SEIU access to the Hospital's premises; (5) refused to release alleged union stewards for training; and (6) refused to process requests for information pertaining to grievances – some of which were otherwise untimely. (Compl. ¶¶ 9, 10(a)-(d), 11). All of these claims lack merit and each is addressed in detail below.

[4] Exhibits from the hearing are cited in this brief as follows: "(JX- __)" for the Joint Exhibits, "(GC-__)" for Counsel for the General Counsel's Exhibits and "(RX- ___)" for the Hospital's Exhibits. The transcript is cited as "(Tr. ___)". The Joint Stipulations are cited to as "(Joint Stipulation No. __)", and were entered into evidence at the outset of the hearing. (Tr. 12-13).

1. Facts

a. The 2017 CBA Between the Hospital and SEIU

The Hospital and SEIU were parties to a CBA effective September 15, 2017 through May 31, 2020. (Joint Stipulation No. 5; JX-6). On May 14, 2020, prior to the expiration of the 2017 CBA, the Hospital and SEIU began negotiations over a successor CBA. (Joint Stipulation No. 6).

b. Ongoing Negotiations and Expiration of the 2017 CBA

While negotiations over the successor CBA were ongoing, the Hospital and SEIU extended the 2017 CBA several times – during which time the parties continued to bargain. (Joint Stipulation No. 7). On January 14, the Hospital announced it would implement non-union employee wage increases effective February 7 – applicable for non-union employees at a number of HCA-affiliated hospitals in the Kansas City area. (Exhibit A, Objection 1). After the Hospital's announcement, SEIU demanded that the Hospital implement a wage increase for SEIU represented employees – even though the successor CBA was not yet ratified. The Hospital declined. (Exhibit A, Objection 6 ("the [Hospital] . . . had rejected the Union's request to implement the market rate wage sooner.")). On February 28 – after 9 months of negotiation and multiple extensions – the parties did not – again – extend the 2017 CBA and, accordingly, it expired. (Joint Stipulation No. 7).

c. Impact of the Expiration of the 2017 CBA

Because the 2017 CBA was not extended beyond, and consequently expired on, February 28, the Hospital stopped all withholding and remittance of SEIU dues from bargaining unit employees because a successor CBA had not been ratified at that time. (Joint Stipulation No. 8). It is undisputed no successor CBA existed as of March 1.[5]

[5] The cessation of dues deductions following the expiration of the 2017 CBA is not at issue herein.

d. The Decertification Petition

On March 29, employees in the unit represented by SEIU filed a Decertification Petition. (Joint Stipulation No. 9). The Decertification Petition sought to remove SEIU as the exclusive collective-bargaining representative of unit employees at the Hospital. (Compl. ¶ 8(c); Joint Stipulation No. 9).

e. Ratification of a Successor CBA

On March 31, two days after the Decertification Petition was filed, SEIU ratified the successor CBA, which became effective April 6. (Joint Stipulation No. 10; JX-7). Accordingly, the Hospital commenced withholding and remitting of SEIU dues pursuant to the terms of the successor CBA. (Joint Stipulation No. 11). It also announced it would implement the previously agreed-upon wage increase provided for in the now-ratified CBA. (Exhibit A, Objection 13 ("the parties had reached agreement on a successor collective-bargaining agreement, including . . . implementation of the market wage increase.")).

f. The Election and Vote Count

On June 14, a ballot count for the Decertification Election was held. (Joint Stipulation No. 12). The tally of ballots showed 387 valid votes cast and the results were as follows: 203 ballots cast against SEIU, 171 ballots cast for SEIU, and 13 challenged ballots. (Joint Stipulation No. 12). Excluding the challenged ballots, the results reflected that SEIU membership voted to decertify by a margin of 32 votes. (Joint Stipulation No. 12). The 13 challenged ballots were insufficient to change the outcome of the election. On June 21, SEIU filed objections to the election. (Compl. ¶ 8(f); Exhibit A). On July 30, the Hospital responded to the Region's request for evidence.

g. The Hospital Withdraws Recognition

In light of bargaining-unit members' unequivocal decision to reject SEIU as their representative – undeniably evidenced by the vote count on June 14 – the Hospital withdrew recognition from SEIU on June 14. (Tr. 194; GC-4). Indeed, Ashley McClellan (the Hospital's Chief Executive Officer) emailed employees after the vote count to notify them that SEIU membership had "raised their voice" and "chosen to remove SEIU as their representative, decertifying the SEIU here at [the Hospital]." (GC-4). McClellan went on to explain that the Hospital was grateful that the employees "formerly represented by SEIU allowed their management team the opportunity to work directly with them for the first time in over a decade." (*Id.*).

h. Impact of Withdrawing Recognition

Consistent with withdrawing recognition, the Hospital stopped all withholding and remittance of SEIU dues from the former bargaining unit members' paychecks after the vote count. (Joint Stipulation No. 13). It also refused to bargain with SEIU about PRN pay at the Hospital, refused SEIU access to its premises, and refused to release employees for union-steward training. Likewise, the Hospital refused to administer grievances or process requests for information served upon it by SEIU based on (1) employees' decision to decertify SEIU and, (2) the untimeliness of the grievances. (Tr. 213-214).[6]

[6] Pursuant to Article 8 of both the 2017 CBA and the successor CBA, grievances must be filed within 21 calendar days (10 calendar days in termination cases) from the time a grievant becomes aware or should have reasonably become aware of the occurrence giving rise to the grievance. (JX-6; JX-7, Article 8, Section 3). Two of the grievances at issue in this matter (JX-13; JX-15) were untimely filed by SEIU. (*Id.*).

i. The Decertification Election is Certified

On February 8, 2022, (almost eight (8) months after the election and during which time an extensive investigation was undertaken by the Regional Director's office) the Regional Director issued a Decision on Objections and Certification of Results. (Joint Stipulation No. 14; Tr. 119; Exhibit A). Therein, the Regional Director overruled all of SEIU's objections and certified the decertification election results. (*Id.*; Joint Stipulation No. 14).[7]

2. Argument and Authority

a. The Law Allows the Hospital to Honor Employees' Clear Vote Albeit at Its Own Risk

The Supreme Court has held that an employer violates § 8 of the NLRA if the employer "effects a unilateral change of an existing term or condition of employment." *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198, 111 S.Ct. 2215, 115 L.Ed.2d 177 (1991) (citing *NLRB v. Katz*, 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962)). Section 8 of the NLRA requires an employer to bargain "in good faith with respect to wages, hours, and other terms and conditions of employment . . . ." 29 U.S.C. § 158(d). And, an employer's failure to bargain collectively in good faith under subsection (d) serves as the predicate to violations under subsections (a)(1) and (5) of 29 U.S.C. § 158. *El Paso Elec. Co. v. N.L.R.B.*, 681 F.3d 651, 657 (5th Cir. 2012). In other words, an employer violates subsection (a)(5) when the employer fails to bargain collectively with union representatives. (*Id.*). Moreover, "Section 8(a)(1) violations are derivative of violations of §8(a)(5). A violation of § 8(a)(1) occurs when an employer takes adverse action against specific

[7] The Regional Director overruled 15 of the 16 objections filed by SEIU and dismissed on its face the 16th objection because it failed to comport with the requirements of Section 11392.5 of the NLRB's Case Handling Manual Part II Representation Proceedings. (Exhibit A).

employees in connection with terms and conditions of their employment that are subject to collective bargaining." *Id.* (citing 29 U.S.C. § 158(a)(1), (5)).

As set forth above, the crux of Counsel for the General Counsel's entire case on this point involves the eight (8)-month period between the election and certification. Counsel for the General Counsel insists the overwhelming preference of employees must be ignored during that period as a matter of law. Counsel is wrong. Rather, the 5th Circuit's decision in *NLRB v. Arkema, Inc.* 710 F.3d 308 (5th Cir. 2013) makes clear the appropriate guiding principle in this situation: an employer "does not automatically violate the NLRA, but merely proceeds at its own risk, when engaging in unilateral activities before a decertification election's results are formally validated." *Arkema, Inc.*, 710 F.3d at 320 (citation omitted) (underline added). That principle – that a party acts at its own risk between a vote count and certification – is well-rooted in existing Board and Circuit Court law in a variety of election contexts. To wit, the 5th Circuit in *Dow Chemical* discussed this very principle in the context of initial and decertification elections, writing:

> Under what we will also call the Mike O'Connor[8] rule, an employer may make unilateral changes following a union victory in an initial representation election and before the employer's election objections are resolved, but does so at its peril. If the employer's objections are sustained, no duty to bargain with the union existed and a failure to bargain charge under [Section] 8(a)(5) will be dismissed. *See N.L.R.B. v. Houston Chronicle Publishing Company*, 300 F.2d 273 (5th Cir. 1962). If the employer's objections are rejected, its duty to bargain relates back to the date of the election, and the employer's unilateral actions while objections were pending are automatic violations of [Section] 8(a)(5). *See Anchortank, Inc. v. N.L.R.B.*, 618 F.2d 1153 (5th Cir. 1980).
>
> Though Mike O'Connor involved an initial representation election won by the union, and the present case involves a decertification election lost by the union, **we see no basis in law or justice for distinguishing between types of election or for distinguishing on a basis of which side won or lost**. Moreover, we view the Act as requiring that its labor peace goals, **as well as protection of workers' freedom**

[8] The Mike O'Connor rule was first announced in *Mike O'Connor Chevrolet-Buick-GMC Co.*, 209 NLRB 701 (1974), *enforcement denied on other grounds*, 512 F.2d 684 (8th Cir. 1975).

> **to choose, be achieved by an even-handed application of the same rules of the game to all elections and to both sides.**

Dow Chem. Co., Tex. Div. v. N.L.R.B., 660 F.2d 637, 654 (5th Cir. 1981) (emphasis added).[9]

Similarly, the Board recently announced the application of this principle in the context of post-anticipatory withdrawal elections in *Johnson Controls*, to wit:

> Assuming the employer refrains from making changes pre-election, if the union *loses* the election and either had challenged a potentially determinative number of ballots or files election objections, or both, **the employer would make unilateral changes after the election at its peril**. If the disposition of the union's ballot challenges were to change the outcome of the election and result in a union victory, the union's representative status would be established as of the date of the election, and the employer's unilateral changes made after that date would violate Section 8(a)(5).
>
> * * *
>
> Similar considerations are brought to bear if the union *wins* the post-anticipatory withdrawal election, and the employer either challenged a potentially determinative number of ballots or files election objections, or both. **Again, the employer would make unilateral changes at its peril**. If the disposition of the determinative challenged ballots results in the union preserving its election win, the union's representative status would be established as of the date of the election, and the employer's unilateral changes made after that date would violate Section 8(a)(5). *Id*.
>
> * * *

Johnson Controls, 368 NLRB No. 20 (N.L.R.B. July 3, 2019) (emphasis added).

The undisputed facts show that on March 29, employees in the SEIU unit filed a Decertification Petition. (Joint Stipulation No. 9). Thereafter, on June 14, the ballot tally showed

[9] The Hospital anticipates Counsel for the General Counsel will argue that *Dow Chemical* and its progeny are no longer good law, because *Dow Chemical* was decided when the standard for withdrawing recognition was "good faith grounds for doubting the union's continued majority status." *Dow Chem.*, 660 F.2d at 657. While the standard applicable to withdrawal has changed since *Dow Chemical* was decided, the appropriate withdrawal standard is immaterial to the issue of an employer's post-election but pre-certification conduct as herein. Notably, current Board law under *Johnson Controls* does nothing to undermine the reasoning reached in *Dow Chemical* or *Arkema.* As set forth herein, *Johnson Controls* expressly contemplates that a party who elects to proceed after an election does so at its own peril before the results of an election are certified.

203 ballots cast against SEIU, 171 ballots cast for SEIU, and 13 challenged ballots. (Joint Stipulation No. 12). The 13 challenged ballots were insufficient to alter the outcome of the election. (Joint Stipulation No. 12).

Given the above, bargaining unit employees undeniably no longer wished to be represented by SEIU. *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000), *quoting NLRB v. Hood Furniture Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (internal citation omitted) (It is well settled that "representation elections are not lightly set aside. There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees."). As such, the Hospital implemented the will of its employees and withdrew recognition – consistent with protecting employees' freedom to choose whether to be represented, or not.

By withdrawing recognition before the vote count was certified, at most, the Hospital acted at its own peril – as it would have had to face the consequences of its conduct if the Region refused to certify the election results. *Arkema, Inc.*, 710 F.3d at 320; *Dow Chem*, 660 F.2d at 654; *Johnson Controls*, 368 NLRB No. 20. But, the Regional Director did certified the results (Joint Stipulation No. 14; Exhibit A) and the Hospital is not liable.

Counsel for the General Counsel's reliance on *W.A. Krueger* is inapposite. There, the Board held that an employer violates Section 8(a)(5) when it proceeds to make unilateral changes before election results are certified. *W.A. Krueger,* 299 NLRB 914 (1990). The reasoning in *Krueger* is highly suspect. Indeed, the 5th Circuit expressly considered – and rejected – its conclusion (*Arkema, Inc.*, 710 F.3d at 320). More important, *Krueger's* holding is contrary to the Board's decision in *Johnson Controls* – which reinforces the principle that a party does not automatically violate the Act when it relies on the results of an election; it merely proceeds at its own risk while awaiting certification.

Given the facts and the law, Counsel for the General Counsel has failed to sustain its burden of production or persuasion. The Hospital lawfully withdrew recognition after the June 14 vote count and the Complaint allegations to the contrary must be dismissed.

b. Counsel for the General Counsel Has Not Proven a Violation

The Hospital incorporates its argument set forth in Subsection 2(a) above to each and every alleged violation of Section 8(a)(5) in the Complaint. But, even if the Hospital's withdrawal was improper under the foregoing authorities (which the Hospital denies), Counsel for the General Counsel has not proven the alleged violations of Section 8(a)(5) discussed below.

i. The Hospital Lawfully Refused to Bargain Over PRN Pay

In the Complaint, Counsel for the General Counsel contends the Hospital unlawfully refused to bargain over PRN[10] pay since June 3, 2021. (Compl. ¶¶ 10(a); 15). This allegation lacks complete merit. Even assuming there was a duty to bargain over PRN pay, SEIU never made a demand to bargain.

On June 3, 2021, Lenny Jones (Vice President SEIU) contacted Kevin Meyers (Labor Relations Director for the Hospital) via email (copying Jones' subordinate, Brenda Davis (Tr. 128)), to request (1) bargaining over and (2) information about (including current flat rate pay for all job classifications) the PRN nurses at Menorah Hospital (an affiliated hospital of, but separate from, RMC).[11] (Tr. 128-129; JX-9). After Meyers, Jones, and Davis exchanged additional correspondence about securing a date for bargaining about the PRNs at Menorah, Davis then – on August 4, 2021 – requested information only about PRNs at RMC. (JX-9-1) ("The Union is

[10] PRNs are nurses that are called upon "as needed staffing" exists. (Tr. 123).

[11] SEIU represents two separate bargaining units of nurses – a unit at RMC and a unit at Menorah. (Tr. 124). Davis admitted during hearing that any allegations pertaining to Menorah are outside the scope of this case. (Tr. 129).

requesting the same information for RMC"). In other words, SEIU never made a demand to bargain with the Hospital about PRN pay at all; instead it simply asked for information about them.

That reality is unquestionably corroborated by Counsel for the General Counsel's own witness – Davis – who admitted on cross examination that SEIU was not really "bargaining" with the Hospital about the PRNs at RMC; rather "it was really a conversation basically. It wasn't bargaining bargaining." (Tr. 124). Indeed, Davis testified that Jones[12] (her supervisor) told her that SEIU and the Hospital were not bargaining over the PRN issues at RMC; rather they were just in informal conversations about PRN wages. (Tr. 129-130).

Given that SEIU never made any demand to bargain – as evidenced both by the sole witness's testimony and exhibit entered during the hearing – the Hospital did not violate Section 8(a)(5) of the Act. (Tr. 124; JX-9). *Reynolds Metal Co.*, 310 NLRB 995, 999 (1993) (alleged demand was insubstantial and did not constitute a demand for bargaining necessary to give rise to a statutory obligation to bargain on the part of employer.); *Scobell Chemical Co. v. NLRB*, 267 F.2d 922, 925 (2d Cir. 1959) (". . . a request to bargain is a prerequisite to the employer's duty to bargain . . . ."). This allegation, therefore, must be dismissed.

ii. The Hospital is not Liable for Dues Between the June 14, 2021 Vote Count and February 8, 2022 Certification

In the Complaint, Counsel for the General Counsel claims the Hospital unlawfully stopped making dues deductions on behalf of former SEIU members since June 12, 2021. (Compl., ¶10(b); 15).[13] Accordingly, it seeks from the Hospital recoupment for SEIU dues that it would have otherwise received between June 14, 2021 and February 8, 2022.

[12] Notably, Jones did not testify at the hearing.

[13] On the face of the Complaint, Counsel for the General Counsel never claimed the Hospital improperly failed to deduct dues prior to June 12. Accordingly, Davis's testimony that there was

To the extent the Hospital's recognition withdrawal is found unlawful (which the Hospital denies), the Hospital is not liable to repay SEIU for union dues not deducted and remitted; those payments are the sole responsibility of the bargaining unit members themselves. Section 302 of the Labor Management Relations Act (29 U.S.C. § 186), generally prohibits any payments of money by an employer to a union. An express exception in Section 302(c)(4) permits an employer to deduct union dues from employees' wages and remit those moneys to their exclusive collective-bargaining representative as long as a valid authorization exits.[14] Significantly, Counsel for the General Counsel put on zero evidence proving valid authorizations exist for any former bargaining unit member. Therefore, even if a violation is found, RMC is not responsible for the payment of dues. 29 U.S.C. § 186.

Moreover, an order requiring the Hospital to pay dues without recouping those amounts from employees would amount to an impermissible and unenforceable punitive damages award. It is well-established that "the Board's remedy must be truly remedial and not punitive." *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1009 (D.C. Cir. 1998); *see also BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 529 (2002) ("Nor can the Board issue punitive remedies."); *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 152 n.6 (2002); *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10-12 (1940). Indeed, the Board "is limited to restoring the previolation status quo." *BE&K Constr*., 536 U.S. at 529. As such "the purpose of a remedial order is to restore the economic status quo that would have obtained but for the company's wrongful action." *Regal Cinemas, Inc.*

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an "improper delay" with dues collection after the successor CBA was ratified is inapposite. (Tr. 121). And, in any event, Davis's testimony on that issue is not credible as the parties jointly stipulated that the Hospital did, in fact, properly deduct dues after the successor CBA was ratified. (Joint Stipulation No. 11).

[14] It is also crucial to note that a violation of this statutory provision subjects employers to **criminal penalties**.

v. NLRB, 317 F.3d 300, 315 (D.C. Cir. 2003) (quotation and brackets omitted); *see also Local 60, United Bhd. of Carpenters & Joiners v. NLRB*, 365 U.S. 651, 657 (1961) (Harlan, J., concurring) (explaining that the purpose of a Board remedy is to "recreate the conditions and relationships that would have been had there been no unfair labor practice").

As explained above, the Hospital's employees (not the Hospital) bear the burden of paying union dues through payroll deductions. If the Hospital were required to pay the full cost of the dues without recouping the same from employees, such a directive would not "restore the economic status quo that would have obtained but for the company's [alleged] wrongful action." *Regal Cinemas*, 317 F.3d at 315. Simply put, encumbering the Hospital without recoupment does not serve a legitimate remedial purpose; it is solely punitive in nature. *Compare Unbelievable, Inc. v. NLRB*, 118 F.3d 795, 805-06 (D.C. Cir. 1997) (holding that Board order requiring employer to pay opposing parties' attorneys' fees was punitive). Moreover, where, as here, the Hospital did not withhold dues in bad faith (because it believed in good faith that the election results would stand), recoupment is appropriate.

Importantly, any order otherwise would do nothing to establish a "deterrent effect" in this case as it is undisputed that the union was decertified in a valid election upheld by the Region. *Local 57, Int'l Ladies' Garment Workers' Union v. NLRB*, 374 F.2d 295, 303 (D.C. Cir. 1967) (Burger, J.) ("[d]eterrence alone is not a proper basis for a remedy."); *Unbelievable*, 118 F.3d at 806 (*quoting Carpenters Local 60*, 365 U.S. at 658 (Harlan, J., concurring))("[I]n order to uphold a remedy, the Board 'must show more than that the remedy will tend to deter unfair labor practices.'"). Rather, such an award would only provide SEIU with an impermissible "windfall." *See Deming Hosp. Corp. v. NLRB*, 665 F.3d 196, 201 (D.C. Cir. 2011) (observing "the Board's obligation[] ... to guard against windfall awards that bear no reasonable relation to the injury

sustained" (quotation omitted)); *Grondorf, Field, Black & Co. v. NLRB*, 107 F.3d 882, 888 (D.C. Cir. 1997) (holding that remedy providing "a windfall" for union benefit plans would constitute punitive order).

Simply put, Counsel for the General Counsel's asserted position, which would require an employer to pay dues owing pursuant to agreements (dues authorization cards) to which the employer is not a party, on behalf of employees the union does not even represent, is farcical. Indeed, the CBA (assuming it was in effect at the time) only ever required "remittance" of dues – not "payment". (JX-6, Article 37; JX-7, Article 37).

Given the foregoing, Counsel for the General Counsel failed to meet its burden of production and persuasion that the Hospital is liable for union dues it refused to withhold and remit between the June 14 vote count and the Region's February 8, 2022 certification of the same.

iii. <u>The Hospital Lawfully Denied SEIU Access to Its Premises</u>

In the Complaint, Counsel for the General Counsel claims the Hospital unlawfully denied SEIU representative access to the Hospital since June 26, 2021. (Compl. ¶¶ 10(c); 15). Not so. As the evidence at trial shows, Counsel for the General Counsel's sole witness (Davis) was not specific during the hearing about any request she made to the Hospital to enter its premises. At best, Davis testified that Kevin Meyers told her that she was "no longer able to come back in [to the Hospital]" after they had a "situation." (Tr. 120). This vague and non-specific testimony fails to establish a violation of the law. Indeed, depending on what the unspecified "situation" was, access may lawfully be denied. *Nyp Holdings, Inc., d/b/a the New York Post & Newspaper & Mail Deliverers' Union of New York & Vicinity*, No. 2-CA-37729, 2007 WL 412199 (N.L.R.B. Div. of Judges Feb. 2, 2007), adopted sub nom. *Nyp Holdings, Inc., d/b/a the New York Post & Newspaper & Mail Deliverers Union of New York & Vicinity*, 353 NLRB 625 (N.L.R.B. 2008) ("The Board

and courts have held that a union may contractually relinquish a statutory bargaining right if the relinquishment is expressed in clear and unmistakable terms.") (citing *American Broadcasting Co.*, 290 NLRB 86 (1988) and *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983)).

Likewise, Counsel for the General Counsel put on zero evidence that SEIU followed the CBA-required process for requesting and obtaining lawful access to the Hospital's premises. Specifically, Article 35 of the 2017 and successor CBAs outline a procedure SEIU must follow to gain entry to the Hospital's premises. (JX-6, Article 35 JX-7, Article 35). First, the representative must provide advance notification of the visit to the Director of Human Resources. (*Id.*). Second, the representative must sign in at the security office and notate the specific part(s) of the Hospital he or she wishes to visit. (*Id.*). And, third, after signing in the representative must notify Hospital Management of his or her presence, the purpose of the visit, and the part(s) of the Hospital he or she is visiting. (*Id.*).

None of Counsel for the General Counsel's witnesses testified that Davis or any other SEIU representative complied with the required procedures for gaining access to the Hospital and, consequently, that Davis was thereafter denied access for any unlawful reason. Accordingly, Counsel for the General Counsel failed to sustain its burden of production or persuasion on this claim and it must be dismissed.

At most, Counsel for the General Counsel cross-examined Kevin Meyers about an email he sent Lenny Jones and Davis on August 15 – after the June 14 vote count. (JX-16). Therein, Meyers wrote that a few days prior to August 15 a SEIU representative appeared at the Hospital for new-hire orientation and the new-hire's presence at orientation "relate[s] to rights rooted in the collective bargaining agreement between the Hospital and the SEIU that was repudiated by formerly represented colleagues in the recent decertification election." (*Id.*). This email, which

speaks for itself, does nothing to evidence that any SEIU representative complied with the access requirements of the CBA – a threshold issue that also precludes any finding that the Hospital violated the Act.[15]

iv. The Hospital Lawfully Refused to Process Requests for Information

Counsel for the General Counsel's Complaint also claims the Hospital unlawfully refused to process requests for information pertaining to grievances filed by SEIU after the June 14 vote count. (Compl. ¶¶ 9, 14). Under well-established law, once an employer lawfully withdraws recognition, it is no longer obligated to provide a union with requested information. *See, e.g., In Re Champion Enterprises, Inc.*, 350 NLRB 788, 793 (2007) ("Following a lawful withdrawal of recognition, an employer no longer has a duty to provide a union with requested information."). Moreover, two of the requests pertain to untimely grievances filed by SEIU. Accordingly, the Hospital was never obligated to comply with those requests at any time.

Significantly, on September 17, October 7, and October 25, 2021, Alexis Straughter (SEIU Organizer) emailed grievances and requests for information to Kevin Meyers pertaining to three former bargaining unit members – Frank Haney, Leilah Torres, and Kendyl Howard. (Tr. 130; JX-13; JX-14, JX-15). In response to each of these grievances and requests for information, Meyers explained (1) that the grievances were not valid because SEIU was no longer the exclusive bargaining unit representative of the employees in question and (2) two of the grievances were untimely under the repudiated CBA. (*Id.*; JX-7, Article 8, Section 3 ("[a] discharge grievance must be filed within ten (10) days of the date the employee is informed of the discharge.").

[15] Notably, no evidence was presented (either on direct or cross examination) that SEIU declined to request appropriate access on the belief that to do so would be futile.

For example, in response to Straughter's October 25 grievance and requests for information pertaining to Kendyl Howard, Meyers penned the following:

> Consistent with our prior communications on grievances at Research Medical Center, the Hospital will continue to recognize and respect the vote of the former bargaining unit members and will not be processing this grievance, nor will we be providing the requested information. We understand the SEIU's position to the contrary, but our position is unchanged.
>
> In addition, had the Hospital needed to respond to the grievance, the Hospital would have denied it as untimely, as Ms. Howard was separated in July.

(JX-13). Likewise, in response to Straughter's grievance and requests for information pertaining to Frank Haney, Meyers wrote, in relevant part:

> Notably, even if the SEIU still represented Research Medical Center employees, or if at some point in the future the NLRB or a court of competent jurisdiction found that they were, this grievance would still be properly denied on its face. The grievance states that Mr. Haney's employment was terminated on August 17, 2021. This grievance was filed September 17, 2021, a month later. The contract clearly states in Article 8, Section 3, that "[a] discharge grievance must be filed within ten (10) days of the date the employee is informed of the discharge." The grievance is clearly untimely and, if the contract were in effect, would be denied for this reason.

(JX-15).

Counsel for the General Counsel put on no evidence contesting the timeliness of the above-referenced grievances and, for that independent reason, failed to sustain its burden of production and persuasion that the Hospital unlawfully refused to process the aforementioned requests for information. *Velan Valve Corp*., 316 NLRB 1273 (1995) (refusal to arbitrate grievance based on untimeliness grounds not basis for violation of Section 8(a)(5) because refusal to arbitrate a narrow class of grievances believed to be untimely did not constitute a wholesale repudiation of the contract).

C. The Hospital did not Coerce Employees to Vote in the Decertification Petition[16]

In the Complaint, Counsel for the General Counsel claims the Hospital unlawfully coerced employees because Joel Morgan allegedly told employees that the Hospital was going to cease deducting union dues from employees' pay because the Hospital believed SEIU was bargaining in bad faith. (Compl. ¶¶ 5(a), 12). Counsel for the General Counsel did not carry its burden that a violation of the Act occurred.

1. Facts

On or about March 4, Joel Morgan (Director of Food Service) held a brief meeting with a few employees to answer questions about existing negotiations with SEIU and the decertification petition that was rumored to be circulating through the Hospital. (Tr. 185). One such participant in that meeting was Debra Cunningham – an open supporter of the union, former Nutrition Care Assistant in the Hospital's Food Service department, and subordinate of Morgan. (Tr. 185; GC-3).[17] Cunningham recorded the March 4 meeting, a practice she regularly engaged in when meetings were held. (Tr. 186, 188-190). The recording, which lasted approximately five (5) minutes, contained a single passing reference to dues deductions and bad faith bargaining early in the meeting – followed by repeated reminders that employees had a right to their own opinions

[16] Counsel for the General Counsel alleged multiple 8(a)(1) allegations premised on alleged conduct by the Hospital during the decertification election initiated by SEIU's own membership. Each of these allegations is addressed in turn below. Importantly, Counsel for the General Counsel withdrew the allegations pertaining to interrogation set forth in ¶ 5(b) of the Complaint. (Tr. 177).

[17] Cunningham was employed with the Hospital for approximately 1 year. (Tr. 185). She was a union steward for approximately 4 months during her tenure. (Tr. 186).

and should vote their consciences. In fact, when time for questions came, not a single question was asked about dues deductions.[18]

2. Argument and Analysis

First and foremost, the audio recording with Morgan undeniably establishes Morgan told employees that dues would not continue to be taken from paychecks because the Hospital "felt like the union is bargaining in good faith." (GC-3). Nowhere in the recording (or transcript) does Morgan make any direct statement that SEIU was, in fact, bargaining in bad faith. More important, however, Morgan went on to immediately explain that dues deductions were stopping anyway because the "contract is no longer auto renewing" and, accordingly, on the following paycheck after the expiration of the agreement "you are no longer going to be getting charged union dues." (*Id.*) (emphasis added).

Counsel for the General Counsel's sole witness about the alleged "coercion" unit employees suffered as a result of Morgan's statement was Cunningham. (Tr. 192). In conclusory fashion, Cunningham testified it was her subjective belief that the sole reason the Hospital was stopping union dues was because SEIU was "bargaining in bad faith" – which she attributed solely to Morgan's isolated statement. (Tr. 192). Her testimony is simply not credible – particularly in light of the fact that Morgan almost immediately thereafter explained that the ultimate reason for the stoppage was the result of then-existing CBA's expiration. (GC-3). The lack of actionable coercion is further highlighted by the complete absence of *any* testimony that Cunningham (herself a union steward) – or anyone else – was coerced (or acted or failed to act based on this single statement). *AT Sys. West, Inc.*, 341 NLRB 57, 60 (2004) (it is the objective evidence of the commission of unfair labor practices that has the tendency to undermine the union, and not the

[18] A transcript of Cunningham's recording was entered into evidence as GC Exhibit 3.

subjective state of mind of the employees . . . ."); *Wire Prods. Mfg. Corp.*, 326 NLRB 625, 627 & n.13 (1998) (looking to violations' "foreseeable tendency to weaken employee support for the Union" as reasonable basis "to infer that they contributed to the employee disaffection," and specifying that the causation analysis does not require a showing of "actual knowledge by the employees of the unfair labor practices").

Likewise, Morgan's statement about SEIU's alleged bad-faith bargaining – on its face – does not amount to the type of coercion under existing Board law that would instill disaffection with a union. Indeed, the Board has identified termination, threats to shutdown company operations and threats to withhold benefits as "hallmark violations" that would be highly coercive and violate the Act; Morgan's statement does not amount to such a "hallmark" level. *Tenneco Auto., Inc. v. N.L.R.B.*, 716 F.3d 640, 650 (D.C. Cir. 2013) ("The Board has consistently held that the types of violations that have detrimental and lasting effects are those involving coercive conduct such as discharge, withholding benefits, and threats to shutdown the company operation.") (citing *Goya Foods of Fla.*, 347 NLRB 1118, 1121 (2006) (discharging three union adherents and suspending another were "hallmark violations" that were highly coercive)); *JLL Rest., Inc.*, 347 NLRB 192, 193 (2006) (threatening employees with closure and job loss is coercive).

Significantly, a simple review, in context, of the entirety of Morgan's recorded conversation with these employees establishes he was not attempting to coerce anyone. On the contrary, Morgan repeatedly and expressly stated that it was <u>each employee's choice</u> whether to vote against continued representation and that he was merely providing <u>facts</u> about dues deductions and employees' rights during decertification, to wit:

> It is my **<u>personal opinion</u>**, again my personal opinion that they (SEIU) are not in the best interest of you. That's my opinion, I'm allowed to have that, **<u>you guys are all allowed to have your own opinion</u>**. What I ask is that all of you respectfully allow each other to have

> **your own opinion** because that's what makes this company great, that's what makes this country great and **we're all allowed to have different opinions**.
>
> * * *
>
> Um, I have been getting a lot of questions about decertification so I wanted to address those with you guys. There is nothing we can do as a leadership team, **that is something that has to be organized by you guys as employees**. . . . **It is completely up to each one of you independently to make that decision on your own**, whether you feel the union best supports you or not. It's not my decision, it's not the Hospital's decision, it's you guys. If **you feel it's valuable you should support it, if you don't hey, that's up to you too.**
>
> * * *
>
> Question: Yeah, I don't understand when you said when they want to give us that raise.
>
> Answer: In order for raises to go into effect you have to have a signed contract. So until we get a signed contract and the union agrees to the terms, **once the union signs it then we can give raises.**
>
> * * *
>
> All right, well thank you guys for your time again, I want you guys to have all the information to make the decision that's right for you, **I'm not trying to push any decision on you**, this is very important for you guys as employees, um, to make this decision if you feel that you're getting what you're paying for.
>
> * * *
>
> Again, we want to be respectful, **everybody has a right to their own opinion**. Um, I don't want to see any bullying, this is something as a team, **you guys have to decide what's right for you.**

(GC-3) (emphasis supplied). No reasonable person could be coerced by such a conversation – particularly when Morgan repeatedly made clear that each employee should vote in the decertification petition in any manner he or she so choose. This conclusion is bolstered by the absence of *any* questions related to dues deductions.

Counsel for the General Counsel failed to sustain its burden of production and persuasion that Morgan's comments "coerced" employees to vote against SEIU in the decertification election. This claim must be dismissed.

D. The Hospital did not Tell Employees it Would be Futile to Select SEIU as Their Bargaining Representative

In the Complaint, Counsel for the General Counsel claims that in April or May 2021, Leo Arias informed employees that it would be futile to select SEIU as their bargaining representative by telling employees that the Hospital was going to do what it wanted regardless of how employees voted in an SEIU decertification election in violation of Section 8(A)(1) of the Act. (Compl. ¶¶ 5(c), 12). This allegation is meritless.

1. Facts

In April or May 2021, Emilio "Leo" Arias[19] led a voluntary meeting with employees to provide them with facts and information about their respective rights during the decertification election. (Tr. 155; 301-303). Paul Obie[20] participated in a voluntary meeting with Arias along with April Richardson and Shawn Wheaton. (Tr. 151-152; 155). During the meeting, Obie asserts Arias informed the group that each individual could sign a document (with which Obie was unfamiliar), but that each was not required to do so. (Tr. 155).

2. Argument and Analysis

Counsel for the General Counsel's sole witness to the allegation that Arias told employees it would be futile to select SEIU as their bargaining representative was Paul Obie. Simply put, Obie's testimony is not reliable.

Throughout his direct and cross-examination, Obie was clearly confused about the context of the meeting held by Arias and the document identified. Indeed, Obie admitted he did not recall

[19] Emilio Arias was and is presently self-employed as a Labor Employee Relations Consultant, Executive Coach, and Professional and Personal Development Trainer. (Tr. 299).

[20] Obie provides Patient Care for the Hospital's Environmental Services Department. (Tr. 151, 152). He has been in the same position for two years. (Tr. 151).

the purpose of the meeting and that he did not ask many (if any) questions. (Tr. 161). He admitted he had no idea what the document referred to during the meeting was – even admitting it could have been an attendance sheet because he did not read it. (Tr. 160). Likewise, he claimed there were four employees at the meeting (Tr. 153 "I remember that there was four of us there"), in direct contradiction to the Regional Director's finding that there were only three employees who attended. (Exhibit A, Objection 12). Notwithstanding his obviously strained recollection of the meeting itself, Obie testified that Arias made a single statement "You can sign it or you don't have to sign it. HCA is gonna do whatever they want to do anyway." (Tr. 155-156). Notably, Obie at no time testified that the alleged statement had any impact on him or anyone else.

In stark contrast to Obie, Arias testified competently and credibly. Arias is a self-employed Labor Employee Relations Consultant, Executive Coach, and Professional and Personal Development Trainer. (Tr. 299). Previously, Arias was a full-time union representative since 2016. (Tr. 299). Accordingly, as a labor consultant and former union representative for many years, Arias is well aware of the kinds of things he can say – and cannot – amidst an election of any kind.

During the hearing, Arias testified that he recalled a decertification election that was held at the Hospital in April 2021 (Tr. 301) and, at that time, Arias's role for the Hospital was to meet with the bargaining unit employees, make them aware of their rights, and to serve as a resource to them. (Tr. 303).[21] He also reliably testified that aside from asking individuals attending meetings to sign attendance sheets, he never asked anybody to sign any document, let alone a petition for decertification. (Tr. 303-05) (". . . I would never ask any employee to sign a petition. I never have and never will."). Importantly, Arias specifically denied that he told anybody that "HCA was going

[21] Arias testified that he met with approximately 2-10 employees each day for approximately two months. (Tr. 301, 307).

to do whatever they wanted to do" regardless of how they voted in the decertification election. (Tr. 305).

Counsel for the General Counsel failed to sustain its burden of production and persuasion on this claim. Arias met with *hundreds* of employees while he was acting as a labor consultant at the Hospital, and the only evidence adduced at trial to support this preposterous allegation came from a single, confused witness – and even that witness did not voice any alleged disaffection with the union as a result of the debunked statement.

E. The Hospital Did Not Prohibit Employees From Wearing Union Insignia

In the Complaint, Counsel for the General Counsel claims that in April or May 2021, Terry Engling prohibited employees from wearing union insignia while permitting employees to wear other insignia, in violation of Section 8(a)(1) of the Act. (Compl. ¶¶ 5(d); 12). This allegation lacks any merit whatsoever.

1. Facts

Spencer Walker is an EVS Technician for the Hospital. (Tr. 135). **Since the outset of his employment, Walker has worn a union button on his name badge.** (Tr. 136).

In approximately April 2021, Walker received a second button from SEIU which reads: "I'm sticking with my union" (Tr. 136-138), which he affixed to the back of his name badge. (Tr. 136-138). He also received a third button in or around April 2021, reading "Hazard pay Now", which he wore on the front of his badge along with the original button he had worn since the beginning of his tenure at the Hospital. (Tr. 141). In all, then, in approximately April / May 2021, Walker donned three union buttons on his work badge: two on the front (his original union button and the "Hazard Pay Now" button) and one on the back ("I'm sticking with my union" button). (Tr. 136-138).

In May 2021, Walker was approached by Terry Engling (Administrative Director of Support Services) (Tr. 274) and Steve Echols (Walker's Manager (Tr. 136)) about his union buttons. (Tr. 140). During the conversation, Engling told Walker that he was prohibited from wearing his "Hazard Pay Now" button while on patient floors, but that he was allowed to continue donning his original union button that he had worn since the beginning of his employment. (Tr. 140; 145, 276). As such, Engling told Walker that he must take the *Hazard Pay* button off. (Tr. 276). Walker claims he did not do so but simply turned it around/swapped its place with the "I'm sticking with my union" button which he wore on the back of his badge. (Tr. 145-146). Notably, there is no testimony he was ever expressly told to remove the only button at issue herein – the "I'm sticking with my union" button. Equally as notable is the absence of any testimony that any discussion about union buttons with him, an open union supporter, affected his (or any other employee's) support of the union.

2. <u>Argument and Analysis</u>

As a preliminary matter, the Regional Director found that there was only one instance of the Hospital improperly requiring Walker to remove union insignia – namely, the alleged demand that he remove the union button that read "I'm sticking with my union." (*See* Exhibit A, Objection 15). To the extent Counsel for the General Counsel claims that any other button removal request (or other action) violated the Act, it is barred from doing so as any such allegations or testimony were found to be without merit as set forth in the Regional Director's Report on Objections and Certification of Election. (Exhibit A).[22]

[22] Indeed, Counsel for the General Counsel's line of questioning related to buttons Walker was allegedly required to remove – other than the "I'm sticking with my Union" button – were found to be without merit by the Regional Director. (Tr. 142). Similarly, Walker's testimony about the removal of SEIU bulletin boards in the EVS breakroom were never alleged in the objections to the decertification election, nor the Complaint, and in any event, took place <u>after</u> the vote tally on June

Moreover, Counsel for the General Counsel's sole witness on this issue (Walker) failed to attest credibly that the Hospital engaged in any wrongdoing whatsoever. Indeed, Walker admitted during the hearing that no one ever told him to take off the button that said "I'm sticking with my union" nor did he do so:

> Q. Okay, so nobody specifically said, "Take the 'sticking with your Union' button off, right?
>
> A. They didn't identify it by name, no. They just said, "Take the buttons off."
>
> Q. And that day person was Terry England[23]; is that correct?
>
> A. Yes.
>
> Q. All right, and can you tell us exactly when that occurred?
>
> A. I – I believe it was around April or so, of 2021.
>
> Q. Okay, and did you, in fact, take both buttons off?
>
> A. Technically, I just turned them around. I didn't actually take them off.
>
> Q. Now, how could you turn them around if one was on the front and one was on the back?
>
> A. Well, I – the – the one that said, "Hazard Pay Now," I moved it to the back, and put the "sticking with my Union," button up front.

(Tr. 145-146). In other words, even giving Walker's testimony all benefit of the doubt, he admitted during hearing that when he was approached by Engling – the sole button at issue herein ("I'm sticking with my union") was on the back of his badge – hidden from Engling's view because it was pressed against his body. (*Id.*). That, of course, comports with Walker's testimony that he was

14. (Tr. 141-143; Exhibit A, Objection 15). Importantly, Counsel for the General Counsel stipulated during the hearing that Walker only offered testimony for purposes of this hearing on the issue of whether he was told to remove his "I'm sticking with my union" button. (Tr. 180-181).

[23] Engling was mistakenly referred to as England during questioning.

(lawfully) told to remove the forward-facing "Hazard Pay Now" button, and Counsel for the General Counsel elicited no testimony from its sole witness that Engling demanded he remove the "I'm sticking with my union" button.

Tellingly, and contrary to the Regional Director's Report on Objections and Certification of Election, Walker also unequivocally testified that he was never told that any directive to remove any button had been rescinded. (Tr. 146 –"Q. Okay, and so there was never a situation where somebody came back to you and said, "I was wrong about telling you to take that off. You can put it back on now." A. No.). Given this admission, it is clear that Walker is *not* the person who was involved in the only allegation regarding union insignia that the Regional Director found to be a violation of the Act. (Exhibit A, Objection 15 "the evidence showed that the prohibition was later rescinded").

In contrast to Walker's irreconcilable testimony, Engling testified clearly and directly that he only instructed Walker to remove the "Hazard Pay" button – an action the Regional Director found lawful. (Tr. 276; *See* Exhibit A, Objection 15). He also credibly denied having ever told Walker to remove the "I'm sticking with my union" button and, moreover, that he had permitted employees to wear union buttons in the past. (Tr. 276). Unlike Walker's testimony, Engling's recounting of the interaction with Walker is wholly consistent with the Regional Director's findings and, moreover Walker's admissions that he was wearing his "I'm sticking with my union" button on the <u>back</u> of his badge when approached, and that he (Walker) had historically been allowed to wear union insignia since the first day of his employment without incident. (Tr. 136; 276).

Counsel for the General Counsel failed to sustain its burden of production and persuasion on this claim; it must be dismissed.

F. The Hospital Did Not Unlawfully Post Flyers About The Union

In the Complaint, Counsel for the General Counsel claims that after June 14, the Hospital unlawfully coerced its employees by sending flyers to them notifying them that SEIU had been decertified and that the employees were no longer represented by SEIU. (Compl. ¶¶ 5(e), 12).

1. Facts

On or after the decertification election vote tally on June 14, the Hospital posted on a bulletin board an email from Ashley McClellan (CEO of RMC). (Tr. 166; GC-4). Counsel for the General Counsel's sole witness on this matter – Ernest Banks[24] – testified that after he saw the email posted on the bulletin board he no longer believed he had union representation. (Tr. 167).[25]

2. Argument and Analysis

First and foremost, nothing about the single "flyer" (McClellan's email) Banks testified about violates the Act. The email provides factual information about the decertification election results and, importantly, nothing in it contains an unlawful general or specific promise of a benefit that could be construed as "coercion." (GC-4). At most, the email contains a statement that "[w]e believe we have a better future together without SEIU and their dues." That rhetoric is not unlawful – as confirmed by both Board law and the Regional Director. *Hospital Partners*, 370 N.L.R.B. 118 (2021); *Children's Center for Behavioral Development*, 347 N.L.R.B. 35, 35 (2006); *see also*

[24] Ernest Banks is a Lead Floor Tech for the Environmental Services Department at the Hospital. (Tr. 164). He has been in this position for three years. (Tr. 165). Banks has also been a union steward for ten years. (Tr. 165).

[25] Gratuitously, Banks testified that Steven Echols (manager) also informed him that he was no longer represented by SEIU and that employees could no longer filed grievances, but Counsel for the General Counsel clarified that these alleged statements are not part of the Complaint. (Tr. 168-169; 179) (Counsel for the General Counsel explaining: "Mr. Banks did testify on direct that he saw this [flyer] on the bulletin board at the Employer's facility, and that is the purpose for which he was called.").

Regional Director's Decision on Objections and Certification of Election (finding "the statement (on the flyer) is too vague to conclude that the Employer was making any implied promise of benefits to employees in exchange for decertifying the Union . . . .").

Moreover, Banks's testimony about alleged statements or conduct that occurred pre-decertification is wholly unreliable. (Tr. 169). Indeed, after Banks testified, Counsel for the General Counsel confirmed to the Administrative Law Judge that "Mr. Banks was called to testify about the allegations pertaining to Paragraph 5(e) that Respondent told employees that SEIU had been decertified, and that employees were no longer represented by SEIU. (Tr. 179). Doing so, Counsel for the General Counsel stipulated Banks's testimony was limited to post-decertification conduct. (*Id.*).

Counsel for the General Counsel has failed to prove its burden of production or persuasion. It is undisputed that the flyer and any statement by Echols (if any occurred at all) took place after the votes were cast in the election. In other words, the evidence put on by Counsel for the General Counsel lacks causation; nothing the Hospital said or did after the decertification vote could have caused employees to vote against the union – a conclusion corroborated by the Regional Director. This claim should be dismissed entirely.

G. The Hospital did not Violate the Act by Refusing to Allow Julie Perry to Attend a Grievance Meeting

In the Complaint, Counsel for the General Counsel alleges the Hospital violated Sections 8(a)(1) and (5) of the Act by failing to meet with NNOC's designated representative Julie Perry during a grievance meeting. (Compl. ¶¶ 7, 13). This allegation is wholly without merit.

1. Facts

a. The Hospital and NNOC's Collective Bargaining Agreement

The Hospital and NNOC maintained a collective bargaining agreement effective October 16, 2018 through May 31, 2021 that possessed a mechanism for processing grievances filed by bargaining unit member(s) or NNOC. (Joint Stipulation 1; JX -2). Germane to this matter is Article 14 of the CBA, which provides the grievance machinery and reads as follows:

ARTICLE 14
GRIEVANCE

Section 1. DEFINITIONS

A. Grievance: An alleged breach of the terms and provisions of this agreement.
B. Grievant: A unit member, a group of unit members, or the Union.
C. Days: Days shall mean calendar days.

SECTION 2. GENERAL PROCEDURES

A. If a grievance effects more than one Unit or department of the Hospital, and relief is unavailable from the immediate supervisor, it may be submitted immediately at Step Two. All grievances must state the specific contractual provision(s) of this Agreement allegedly violated, the specific incident(s) (including names known or that become known to the Union during the grievance/arbitration process of persons allegedly involved) that give rise to the grievance and the remedy sought.

B. Time limits under this Article may only be extended by the mutual agreement of the parties in writing.

C. All grievances and responses to grievances shall be rendered in writing at each Step of the grievance procedure with the specific reason(s) for acceptance or denial.

D. The parties agree to make available all relevant documents, communications and records material to the alleged grievance upon request by either party in writing.

E. Failure by the Union to follow the requirements and time limits contained herein for the filing and processing of a grievance shall render the grievance null and void.

F. If the Employer fails to provide responses, in accordance with the timelines agreed upon, the grievance shall be considered denied and the Union may advance it to the next step.

G. The purpose of the grievance meeting is to engage in a good faith effort to resolve the dispute. At each step in the process, it is expected that individuals with authority to make agreements will participate in the meetings and will seek to come to a satisfactory resolution.

H. Informal Resolution: Any RN who has a dispute that could be the subject of a grievance shall first present the dispute informally and verbally to his/her immediate supervisor before initiating a formal grievance, unless the RN's grievance directly relates to claims of unlawful harassment or discrimination by the immediate supervisor or termination of employment. This discussion may take place with or without the presence of a Union representative, at the RN's option. If the dispute is not resolved to the RN's satisfaction, s/he may request that the Union advance the complaint to the Step One of the formal grievance procedure.

SECTION 3. STEP ONE

Within twenty-one (21) calendar days of the time a grievant(s) becomes aware or should have reasonably become aware of the occurrence giving rise to the grievance, the authorized Union Representative shall file the written grievance with the Manager of the Nursing Unit to which the grievant is regularly assigned. For purposes of this Article, the grievance will be considered filed upon hand delivery to the appropriate Manager, upon receipt of the grievance via scanned email attachment, via facsimile at 816.276.3571 or at some other fax number later designated by the Hospital in writing. The Manager with whom a grievance is appropriately filed shall be responsible for providing the Human Resources Director/V.P. with a copy of the grievance. However, an exception to this twenty-one (21) day time limit occurs in discharge cases. A discharge grievance must be filed within ten (10) calendar days of the date the Employee is informed of the discharge and must be filed initially at Step Two.

The grievant and/or the authorized Union Representative and the Hospital may meet to discuss resolution of any grievance at a mutually agreed upon time and date, but such meeting(s) will not extend the time limits for processing of grievances as set out in this Section. The Grievant will be represented by the Union Representative. The Hospital will be represented by the appropriate Hospital representative(s) which will typically be the Manager or Director of the Nursing Unit to which the Grievant is regularly assigned (or his/her designee).

The Hospital shall respond, in writing to the Union within twenty-one (21) calendar days of its receipt of the grievance.

SECTION 4. STEP TWO
If not resolved in a mutually satisfactory manner at Step One, the authorized Union Representative may submit the grievance in writing to the Chief Nursing Officer (CNO) or previously authorized designee within seven (7) calendar days following receipt of the Hospital's response in Step One.

The grievant and/or the authorized Union Representative and the Hospital may meet to discuss resolution of any grievance at a mutually agreed upon time and date, but such meetings will not extend the time limits for processing of grievances as set out in this Section.

A request to meet by either party will not be unreasonably denied. The Grievant may be present at the meeting and will be represented by the Union Representative. The Hospital will be represented by a member of senior management (or his/her designee(s)).

The Hospital shall respond in writing to the Union within fourteen (14) calendar days of the CNO's or previously authorized designee's receipt of the written submission of the Step Two grievance.

SECTION 5. OTHER MATTERS
Grievance meetings will normally be scheduled during the non-working time of the grievant. Time spent in grievance meetings by the grievant will be unpaid time unless the grievance meeting is scheduled during the grievant's work shift for the convenience of the Hospital. Representatives of the Hospital's Human Resources Department may participate in any grievance meeting, but are not obligated to do so. Investigation of grievances by union representatives will be conducted in accordance with Article 46 (Union Activity, Visitation and Bulletin Boards).

Grievances shall be filed and responded to on the appropriate grievance form as agreed upon by the parties to this Agreement.

(JX-2; Article 14, Section 4 (emphasis supplied); Tr. 93-94).

b. Lisa Broeker's Grievance on Behalf of Destinee Arthur

On August 16, Lisa Broeker[26] filed a grievance on behalf of Destinee Arthur[27] over the placement of medical and surgical patients on the Women's Services Unit. (Tr. 32; 34; JX-3; Joint

[26] Lisa Broeker is a Labor and Delivery Nurse for the Hospital. (Tr. 30:17-19). She is also a Nurse Rep and a member of the Professional Practice Committee, and occasionally sits in on the Staffing Committee for her unions, NNU and NNOC. (Tr. 31:1-5).

[27] Destinee Arthur is a Registered Nurse in the postpartum-GYN department. (JX-3).

Stipulation No. 3).[28] At the time Broeker filled out the grievance, she listed **herself** as the Labor Representative and placed Julie Perry's[29] name in the signature line for the "Grievant or Labor Representative" signature. (Tr. 58, 59; JX-3).

After filing the grievance, Broeker emailed Celeste Clelland[30] (Director of Women's Services) to schedule a Step 1 grievance meeting. (Tr. 34; RX-5; RX-11). Clelland processed the request and scheduled the meeting for September 17. (Tr. 37; Joint Stipulation No. 4, RX-6). Doing so, Clelland requested from Broeker the person(s) who would be attending the meeting. (Tr. 282). Broeker responded that she would be attending as the "union rep[resentative]", along with Arthur ("the grievant") and Cheryl Rodarmel ("chief nurse rep[resentative]"). (Tr. 287; RX-13).[31]

c. The Step 1 Meeting

On September 17, the Hospital and NNOC held the aforementioned Step 1 meeting. (Tr. 196). Attending on behalf of NNOC were Broeker and Arthur. (Tr. 38, 98, 196). Clelland, Weston Smith (Human Resources Business Partner), and Kevin Meyers attended on behalf of the Hospital. (Tr. 196).

At the outset of the meeting, Smith informed Broeker and Arthur that Rodarmel would be excluded from the meeting because only one representative was allowed to attend pursuant to the

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[28] Prior to filing the grievance, Broeker met with Celeste Clelland on behalf of (and with) Arthur for an informal meeting as contemplated by the CBA. (RX-1; JX-2, Section 2, H).

[29] Julie Perry is a Labor Representative of NNOC and has held that position since 2009. (Tr. 92). As a Labor Representative, Perry is responsible for general contract administration, bargaining, grievance filings, and other duties on behalf and with members. (Tr. 93).

[30] Clelland is Broeker's director. (Tr. 34:5-6).

[31] Broeker wrote: **"As far as attendees, it should be Destinee (the grievant), *me (union rep)*, and Cheryl Rodarmel (chief nurse rep) in attendance *on behalf of the union*. I will contact them to find out their availability."**

express terms of the CBA. (Tr. 38). In response, Broeker advised Smith that Rodarmel could not attend the meeting anyway due to personal reasons. (Tr. 38). She went on, however, to explain that Perry would be attending via telephone in Rodarmel's stead. (Tr. 38).

Meyers informed Broeker that Perry – too – would be prohibited from attending the Step 1 meeting for the same reason – i.e., Arthur was only entitled to one representative under the CBA. (Tr. 38, 198; 287-288).[32] Broeker then claimed Perry needed to attend as a witness. (Tr. 39). In response, Meyers told Broeker she could fill both roles (witness and representative) and that, in any event – again – the CBA only allowed for one representative during the meeting. (Tr. 39, 198, 287-288).

At that time, Smith gave Broeker the option of postponing the meeting. (Tr. 72). Meyers also told Broeker she could stop the meeting at any time and go outside to call Perry if needed. (Tr. 72, 222, 247). In fact, Broeker did so (leave and call Perry) (Tr. 287-89) before making the decision to proceed voluntarily and without her – whereupon Broeker told Meyers she was "good to go forward." (Tr. 38-39, 222). Neither before nor after proceeding with the meeting did Broeker opt to withdraw and substitute Perry as the representative on behalf of Arthur. (Tr. 293).

d. <u>Perry Emails Meyer's About Attending the Step 1 Meeting</u>

After learning that she (Perry) would not be granted permission to attend the Step 1 meeting telephonically, Perry emailed Meyers to inform him that she was a *witness* to bargaining history allegedly relevant to the underlying grievance and, as such, believed the Hospital was in violation of the CBA by denying her access:

[32] It is undisputed that Meyers directly referred to the actual language of the CBA when he made his statement as he had the CBA in front of him and open to the applicable Article. (Tr. 287-288).

From: Julie Perry <jperry@nationalnursesunited.org>
Sent: Friday, September 17, 2021 11:35 AM
To: Meyers Kevin <Kevin.Meyers@HCAHealthcare.com>
Subject: {EXTERNAL} Today's Women's Floating Grievance Meeting

CAUTION! This email originated from outside of our organization. **DO NOT CLICK** links or open attachments unless you recognize the sender and know the content is safe.

You are in violation of the grievance article by not allowing me to be present. Section 1, 2.G. And 3.

Further, I am a direct witness to this bargaining history. Your actions do not work towards resolution and violate the contract.

Get Outlook for iOS

(JX-4). Nowhere in her communication to Meyers – nor at any other time – did Perry ask to be substituted for Broeker as the *representative* for Arthur. (Tr. 110-111). Neither did she suggest to Broeker that she (Perry) be substituted. (Tr. 111).[33]

Meyers responded to Perry's September 17 correspondence and denied any allegation of wrongdoing. (JX-5). Doing so, he clearly and articulately explained the basis for prohibiting her participation in the meeting – namely, that the CBA expressly authorized only a single representative to attend such meetings:

[33] Prior to her email communication on September 17, Perry never interacted with Hospital management about the underlying grievance at all. (Tr. 107).

From: Meyers Kevin
Sent: Tuesday, September 21, 2021 9:30 PM
To: Julie Perry <jperry@nationalnursesunited.org>
Subject: RE: Today's Women's Floating Grievance Meeting

Julie,

We disagree. It's a pretty thin slice of the tomato to say that the Union was not present in the meeting when a Union representative was present. That's the ordinary meaning of the words – the union representative represents the union. Lisa functioned as both grievant and representative for the union during the meeting. (And might I add, with no agenda at all, that she did a very good job.) If we want to parse language further, I'd point out that paragraph 2 of the Step One section of the Grievance article states that "The grievant and/or the authorized Union Representative and the Hospital may meet…" The and/or language has a clear meaning: the grievant is not necessary at the meeting provided the rep appears. The rep appeared and, in the room, when we explained why we were denying your telepresence, Lisa told us that she was fine with that and could handle it herself. Finally, I'd like to point out the permissive language used around the concept of a Step One meeting itself: the Hospital does not have to meet at all. It strains credulity to argue that we've violated the contract by not having personnel of your choosing at a meeting that we are not obligated to have whatsoever.

Contrary to your statement at the end of your email, my actions are not to stifle resolution, and a plain-language reading of the contract shows that they were not in violation of the contract. My intent was and is to enforce the contract as it is written to effectuate the agreement of the parties. Limiting the number of people in a meeting is also an effective tool to ensure that the meeting is effective and leads to its purpose: resolving the disagreement between the parties without need for outside intervention. To that end, I think that Lisa would agree that a robust and fruitful conversation was held on Friday, and I am working with my team to determine what next steps may look like.

I'd be more than happy to discuss further if you'd like.

Best,

Kevin

e. Perry's Subsequent Grievance

Over two weeks later, on October 8, Perry filed a grievance against the Hospital for refusing to allow her attendance during the grievance meeting on September 17. (RX-7). Specifically, Perry asserted that the Hospital violated Article 14 Sections 1, 2 and 3 of the CBA by denying her access to the Step 1 meeting because the Hospital – in effect – had selected the "Union's Representatives" for the meeting. (RX-7). Perry filed her grievance at the Step 2 level because she understood a Step 1 meeting was voluntary under the express terms of the CBA. (*Id.*; Tr. 103).

2. Argument and Analysis

a. A Grievant is not Entitled to Multiple Representatives Under the Act

In *NLRB v. Weingarten*, 420 U.S. 251 (1975), the Supreme Court approved the Board's conclusion that Section 8(a)(1) of the Act provides employees the right to be accompanied and

assisted by their union representative at meetings where the employee reasonably believes disciplinary action could follow. *Id.* at 260, 263. The selection of an employee's representative belongs to the employee and the union, in the absence of extenuating circumstances, as long as the selected representative is available at the time of the meeting. *Anheuser-Busch, Inc*., 337 NLRB 3 (2001), *enfd.* 338 F.3d 267 (4th Cir. 2003); *Pacific Gas & Electric Co*., 253 NLRB 1143 (1981).

However, *Weingarten* does not entitle an employee to multiple representatives during such a meeting. *In Re Barnard Coll. & Transp. Workers Union of Am., Local 264, AFL-CIO*, 340 NLRB 934, 935 (N.L.R.B. 2003) ("Although the Union ultimately demanded that two representatives be present at the interview, **a demand that *Weingarten* does not require the [employer] to meet** . . .") (emphasis added); *See also In the Matter of the Arbitration Between INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 710, Union, and JEWEL FOOD STORES, Employer*, 2004 WL 6332114 (Arbitrator Submitted Award 2004) ("[t]he Union ha[d] cited no decisions of the NLRB or the courts that would give Grievants the right to demand a representative from the Union hall when the Steward is already present.") (attached as **Exhibit B**).

First, the undisputed, recorded facts in this case, while perhaps inconvenient to Counsel for the General Counsel, cannot be ignored and are fatal to this claim. Broeker filed a grievance on behalf of Arthur and *signed it* as the Labor Representative handling the grievance. (Tr. 58, 59; JX-3). Thereafter, she again *self-identified* as the "union rep[resentative]" who would be attending the September 17 Step 1 meeting on behalf of Arthur – and in fact did so. (Tr. 38, 98, 196). Accordingly, the Hospital did not violate the law; Arthur was, in fact, accompanied by a representative during the meeting in compliance with the Act.[34]

[34] Arguably, Arthur was not entitled to representation at all. *Weingarten* requires access to representation where an employee has a reasonable belief that discipline may issue from the meeting. The uncontested testimony, however, establishes that the underlying grievance involved

Second, the evidence does not support Counsel for the General Counsel's assertion that the Hospital selected Arthur's union representative during the meeting. On the contrary, not only did Broeker self-identify as attending in the capacity of the union representative for the designated grievant, the unrebutted testimony establishes that the Hospital then provided Broeker with the option of postponing the meeting if she was concerned about moving forward without Perry's participation. (Tr. 72). Likewise, the unrefuted testimony shows Broeker was told she could stop the meeting at any time to confer with Perry if needed. (Tr. 72, 222, 247). Moreover, the evidence unequivocally shows Perry never once requested (in either her communications with Broeker or with Meyers) to be substituted for Broeker during the meeting. (Tr. 110-111; JX-4). And, Broeker made no such substitution request; rather, she returned from conferring with Perry at the outset of the meeting and undeniably made the decision to proceed without her – telling Meyers she was "good to go forward." (Tr. 38-39, 222, Tr. 287-89).

Simply put, there is no credible argument that the Hospital selected Arthur's union representative; it merely confirmed that only one representative would be permitted to attend (consistent with the Act and the parties' CBA) – leaving the choice up to Arthur and NNOC as to who that representative should be. That Arthur/NNOC selected Broeker instead of Perry does not form the basis of an unfair labor practice.[35]

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an issue of contract interpretation, not any potential discipline. (Tr. 32; 34; JX-3; Joint Stipulation No. 3).

[35] To the extent Counsel for the General Counsel claims Meyers's response to Perry's October 8 grievance constitutes an admission that the Hospital did not allow Arthur her choice of representative, its argument mischaracterizes the response. Meyers's response does nothing to alter the Hospital's position about the language contained in the CBA. Indeed, his reference to Perry's allegation and argument is merely that – a reference to the *union's* argument and not some "gotcha" concession.

b. A Grievant is not Entitled to More Than One Representative Under the CBA

The NLRA does not require the Hospital to allow multiple union representatives entry to a non-disciplinary grievance meeting. The Hospital and NNOC entered into a CBA and the Hospital merely followed the express terms of the CBA to which the parties were bound.[36]

As the Board explained in *KOIN-TV*,

> Under the contract coverage standard adopted by the Board in *MV Transp., Inc*., 368 N.L.R.B. 66 (2019), the Board will "examine the plain language of the collective-bargaining agreement to determine whether action taken by an employer was within the compass or scope of contractual language granting the employer the right to act unilaterally." *Id.* In conducting that inquiry, the Board will apply "ordinary principles of contract interpretation." *Id*. And, "[w]here contract language covers the act in question, the agreement will have authorized the employer to make the disputed change unilaterally, and the employer will not have violated Section 8(a)(5)."

Nextar Broadcasting d/b/a KOIN-TV, 369 N.L.R.B. 61, slip op. at 2-4 & n.10 (April 21, 2020). The language applicable to the Step 1 meeting can be found at Article 14, Section 3, which reads, in relevant part, as follows:

> The grievant and/or **the authorized Union Representative** and the Hospital **may meet to discuss** resolution of any grievance at a mutually agreed upon time and date, but such meeting(s) will not extend the time limits for processing of grievances as set out in this Section. **The Grievant will be represented by the Union Representative.** The Hospital will be represented by the appropriate Hospital representative(s) which will typically be the Manager or Director of the Nursing Unit to which the Grievant is regularly assigned (or his/her designee).

(JX-2, Section 3) (emphasis added).

[36] That NNOC and the Hospital dispute whether they have successfully negotiated a successor CBA (to follow the CBA that expired on May 31) is of no consequence. First, the grievance machinery contained in Joint Exhibit 2 is identical under both. (Joint Stipulation No. 2). Likewise, the Hospital and NNOC have been operating under that machinery during negotiations – evidenced by the fact that the Hospital processed the underlying grievance at issue and that Perry referred to Article 14 Sections 1, 2, and 3 as a basis for her October 8 grievance pertaining to her denied participation in the Step 1 meeting. (JX-4).

The language of the CBA could not be more clear.

First, a Step 1 meeting under the CBA is permissive; not mandatory. In other words, neither Arthur (nor any representative of NNOC) was obligated to attend the Step 1 meeting at all. That much is not in dispute as Perry testified that she filed her October 8 grievance at the Step 2 level – admitting she understood Step 1 meetings under the CBA were voluntary, not mandatory. (RX-7; Tr. 103). Given that the meeting was voluntary, Counsel for the General Counsel cannot credibly claim the Hospital selected Arthur's representative as neither she (nor anyone else) were even obligated to attend in the first place.

Second, the CBA explicitly makes certain that Arthur was entitled to be represented by **The Union Representative**. (JX-2, Article 14, Section 3). It does not read that she was entitled to representation by: union representative**(s)**; **two** representatives; **multiple** representatives; or any other non-singular form of representation. (*Id.*).

Consistent with this express language, NNOC designated Broeker as **the** representative to attend the informal meeting with Clelland. (RX-1; JX-2, Section 2, H). Doing so, Broeker completed the grievance submitted on behalf of Arthur – designating **herself** as Labor Representative. (Tr. 58, 59; JX-3). She thereafter informed Clelland she would be attending the Step 1 meeting on behalf of Arthur as the union representative: **not** as a grievant; **not** as a witness; and **not** in any other capacity. (Tr. 37; Joint Stipulation No. 4, RX-6; RX-13). In fact, after learning Perry would be denied participation in the Step 1 meeting, Broeker proceeded as Arthur's representative; confirming she was "good to go forward." (Tr. 38-39, 222, 247, 287-89).[37]

[37] Any argument that Broeker was compelled by the Hospital to continue with the meeting based on a concern over the timeliness of the grievance is wholly undermined by the uncontested fact that the parties had previously discussed that the procedural deadlines could be mutually adjusted

Thereafter, Broeker took the lead in sending a proposal to the Hospital in an attempt to resolve the grievance before moving the grievance to Step 2 and liaised with the Hospital about potentially resolving the grievance short of arbitration. (Tr. 74-75; RX-2; RX-3).

Given the above, the Hospital complied with the express terms of the CBA; Arthur was accompanied by a representative during the grievance meeting – Broeker.

To the extent Counsel for the General Counsel alleges Perry was impermissibly denied access to the September 17 meeting on the basis that she was attending in a non-union-representative capacity (i.e., as a witness to bargaining history, a grievant, etc.), such an allegation is outside the scope of the Complaint in this case. Accordingly, it cannot form the basis of an actionable unfair labor practice.

Based on all the evidence at the hearing, it is clear that NNOC intended to have more than one union representative participate in the September 17 meeting in violation of the CBA. Indeed, Perry admitted on cross examination that she never asked to replace Broeker during the meeting and Broeker admitted that she never asked that Perry replace her; rather both intended to participate. (Tr. 101, 293). Moreover, conspicuously absent from Counsel for the General Counsel's evidence are the text messages between Perry and Broeker on September 17 pertaining to Perry's participation in the meeting. (Tr. 38, 75-76). Accordingly, the Hospital requests the Administrative Law Judge take notice of such failure and adversely infer that the substance of the text messages either (1) were inconsistent with the witnesses' testimony about their intentions or

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and in fact the parties had done so. (Tr. 19, 63-65; RX-14). It is also undisputed that Broeker was in direct communication with Perry (via text and telephone) who could have addressed any such concerns if Broeker truly had them at the time. The failure of Counsel for the General Counsel to produce those communications supports the paucity of this manufactured excuse.

(2) directly evidence the true reason Perry wanted to attend – namely, that NNOC intended to have cumulative representation on Arthur's behalf in express violation of the CBA.

The express language of the CBA – as negotiated between NNOC and the Hospital – provides a grievant with her statutorily protected right to be accompanied by a single representative during a grievance meeting where disciplinary action is reasonably believed to follow. That the Hospital insisted on compliance with the terms of the parties' CBA is not a violation of the law. Counsel for the General Counsel failed to sustain its burden of production and persuasion and this claim should be dismissed.

c. <u>No Past Practice Exists</u>

During hearing, Counsel for the General Counsel attempted to put on evidence that the Hospital has a past practice of allowing more than one union representative to attend Step 1 meetings. Specifically, Perry testified that she has attended at least 10 Step 1 meetings telephonically (Tr. 98). Tellingly, however, she did not testify she participated in these meetings as a <u>second</u> representative. Rather, consistent with Smith's competent testimony during the hearing, Perry only attended Step 1 meetings with other representatives (e.g., a steward) when those representatives were the actual grievant rather than the union representative. (Tr. 272). Indeed, Smith confirmed during the hearing that the issue (i.e., a grievant being represented by two union representatives) had not come up prior to the September 17 meeting. (Tr. 268).[38]

[38] Perry testified that there was a Step 1 meeting that involved 15 to 20 nurses and thus the grievants (each individual nurses) were brought in 5 at a time. (Tr. 96). Multiple representatives were also present. (*Id.*). Notably, however, there was no evidence those representatives were not also grievants – so the conclusory testimony does not meet the Counsel for the General Counsel's burden in this matter.

To the extent Perry's testimony is credited at all for the proposition that she participated as a second representative in a Step 1 meeting, on rebuttal Perry identified only a *single* example of such a situation. (Tr. 96).[39] One instance does not a past practice make. *Pac. Mar. Ass'n v. Nat'l Labor Relations Bd.*, 967 F.3d 878, 895 (D.C. Cir. 2020) (Rao concurring) ("disputed evidence of past practice cannot supplant the plain meaning of a contract provision); *Igt d/b/a Int'l Game Tech. & Int'l Union of Operating Engineers Local Union 501, AFL-CIO*, 366 NLRB No. 170 (N.L.R.B. Aug. 24, 2018) ("To establish a past practice . . [a party] must show that the [practice] was similar in kind and degree and occurred with such regularity and frequency that employees could reasonably expect the practice to continue or recur on a regular and consistent basis. A history of [the practice on] a random, intermittent, or discretionary basis is insufficient.").

But even if it did, Article 8 of the CBA contains a "complete agreement" provision; which reads as follows:

> It is acknowledged and agreed that during the course of negotiations preceding the execution of this agreement, matters and issues of interest to the Union, the Employees, and to the Hospital pertaining to wages, hours and conditions of employment have been fully considered and negotiated, that each party was afforded the unrestricted right to pursue and discuss proposals pertaining to such matters and that the understanding and agreements arrived at by the parties during the course of said negotiations are fully set forth in this Agreement. This Agreement constitutes the entire Agreement between the parties hereto and supersedes all previous agreements, commitments or practices, whether oral or written, unless expressly stated to the contrary herein. No addition to, alteration, practice or waiver of any term, provision, covenant, or condition or restriction in this Agreement shall be of any force or effect whatsoever unless made in writing and executed by the parties. **The failure of either party to exercise right under the Agreement to insist upon strict compliance with its provisions will not be considered a waiver of its right to exercise that right or to insist upon strict compliance in the future.**

[39] The grievance Perry pointed to in rebuttal involved an off-campus grievance where the Step 1 meeting took place at Brookside (the Outpatient Surgical Services) campus. (Tr. 317). However, that grievance involved a workplace violence element. (Tr. 318). Simply put, that meeting was not similar to a standard grievance meeting held by the Hospital. (Tr. 243).

(Tr. 227-229) (emphasis added).[40] Accordingly, to the extent Perry's testimony about a prior "second representative" meeting is credited at all; the parties agreed that the Hospital could strictly enforce the provisions of the CBA regardless of whether it had insisted on strict compliance in the past. As such, any evidence of past practice is negated and Counsel for the General Counsel has failed to sustain its burden of production and persuasion.

d. *Native Textiles* is not Applicable and the Region Should Have Deferred the Charge

Counsel for the General Counsel raised *Native Textiles*, 246 NLRB No. 38 (1979) as the basis for which the Hospital is liable for refusing Perry admittance to the September 17 grievance meeting based on the theory that the Hospital selected Arthur's representative. (Tr. 15). As set forth in great detail above, the Hospital – undeniably – did not select the representative; it merely required NNOC to determine which representative it wished to attend the meeting (Broeker or Perry). As such, *Native Textiles* is wholly inapplicable to this case.

For the same reasons, the charge allegations pertaining to NNOC involve – solely – issues of contract interpretation that should have been deferred to the parties' grievance and arbitration machinery under *Collyer Insulated Wire*, 192 NLRB 837 (1971) and *United Technologies Corp.*, 268 NLRB 557 (1984). That the Region refused to do so was in clear error in this case; the parties negotiated a grievance and arbitration article for addressing these very types of contractual disputes. NNOC should have been forced to use that procedure for addressing its concerns. Indeed, an arbitrator (not the Administrative Law Judge) should be rendering a decision on this issue pursuant to the express terms of the agreement reached between NNOC and the Hospital. *NCR Corp.*, 271 NLRB 1212, 1213 (1984) (quoting *Vickers*, 153 NLRB at 570) (""[W]hen 'an

[40] Over the objection of the Hospital, Article 8 was not admitted into evidence, but an offer of proof was made during the hearing. (Tr. 225-229).

employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it,' the Board will not enter the dispute to serve the function of arbitrator in determining which party's interpretation is correct.").

IV. CONCLUSION

The Hospital acted lawfully when it opted to honor the overwhelming choice of its employees not to be represented by SEIU. It likewise acted lawfully during the decertification period; and nothing it said or did changed (or was intended to, or actually did, change) anyone's vote. Similarly, the NNOC nurse representative self-identified as attending the sole grievance meeting at issue as the "union rep" – a fact that cannot now be overlooked and which was consistent with her handling of the matter prior to and after that meeting. The real pretext underlying that claim is NNOC's desire to have multiple representatives at grievance meetings. But, NNOC never bargained such a provision in the CBA and the current attempt to have the Administrative Law Judge impose such a term on the Hospital is improper. For all of the foregoing reasons, the Hospital respectfully submits that Counsel for the General Counsel's Complaint, as amended, should be dismissed in its entirety.

Submitted 17th day of June, 2021.

/s *Patricia G. Griffith*

_____

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 17

MIDWEST DIVISION - RMC, LLC, D/B/A
RESEARCH MEDICAL CENTER

and **Cases: 14-CA-287441**
14-CA-286571
NNOC – MISSOURI & KANSAS/NNU, AFL-CIO **14-CA-278811**

and

SERVICE EMPLOYEES INTERNATIONAL
UNION HCII, MISSOURI/KANSAS DIVISION

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on June 17, 2022, he served the foregoing **POST-HEARING BRIEF ON BEHALF OF RESPONDENT,** to the following individuals via U.S. Mail and where indicated via E-mail.

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Exhibit A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14

Midwest Division – RMC, LLC[1]

Employer

and

Kelly E. Pirman

Case 14-RD-274944

Petitioner

and

Service Employees International Union HCII, Missouri/Kansas Division[2]

Union

REGIONAL DIRECTOR'S DECISION ON OBJECTIONS AND CERTIFICATION OF RESULTS

Based on a decertification petition filed on March 31, 2021, and pursuant to the stipulated record and a Decision and Direction of Election, a mail ballot election was conducted between Monday, May 17, 2021, and June 14, 2021, to determine whether a unit of employees of Midwest Division-RMC, LLC (Employer) wish to be represented for purposes of collective bargaining by Service Employees International Union HCII, Missouri/Kansas Division (Union). That voting unit consists of:

> All full-time and regular part-time (including eligible per diem) employees employed by the Employer at its facilities located at 2316 East Meyer Boulevard, and 6601 Rockhill Road, Kansas City, Missouri, in one or more of the following combined units: 1) technical employees; 2) service and maintenance employees, but EXCLUDING skilled maintenance employees, managers, guards, and supervisors, as defined by the Act, confidential employees, physicians, professional employees, nurses and/or clinical educators, or coordinators, clinical nurse specialists, clinical coordinators, case managers/utilization review and/or discharge planners, nurse practitioners, accounting or auditing RNs, infection control/employees health nurses, risk management/performance improvement and/or quality assurance or quality management nurses, business office clerical employees, employees of outside registries and other agencies supplying labor to the Employer, already represented employees and per diem employees who do not otherwise qualify as regular employees according to the NLRB.

[1] The Employer's name appears as amended by the stipulated record.

[2] The Union's name appears as amended by the stipulated record.

The tally of ballots prepared on June 14, 2021, at the conclusion of the election shows that of the approximately **658** eligible voters, **171** votes were cast for and **203** votes were cast against the Union, with thirteen (13) challenged ballots, a number that was deemed insufficient to affect the results of the election. There were also twenty-five (25) ballots declared void by the Board agent conducting the ballot count.

On June 21, 2021, the Union filed sixteen timely objections to conduct affecting the results of the election with a supporting offer of proof. A copy of the Objections is attached to this decision as Exhibit 1. Pursuant to Section 102.69 of the National Labor Relations Board (NLRB) Rules and Regulations, and Section 11407 of the NLRB Representation Proceedings Case Handlings Manual (Part two), the Acting Regional Director caused an administrative investigation of the Union's Objections to be conducted concurrently with the pending unfair labor practice charges that encompassed much of the same conduct alleged in the Union's Objections. After carefully considering the Union's offer of proof and supporting evidence, I have concluded, for the reasons set forth in this decision, that the offer of proof and evidence produced by the Union is not sufficient to meet its burden of showing that the proffered evidence would be grounds for setting aside the election if introduced and credited at a hearing. Accordingly, I am overruling the Union's objections, as set forth more fully below.

STANDARD FOR SETTING ASIDE ELECTIONS AND BURDEN OF PROOF

It is well settled that "representation elections are not lightly set aside. There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000), quoting *NLRB v. Hood Furniture Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (internal citation omitted). Therefore, "the burden of proof on parties seeking to have a Board supervised election set aside is a heavy one." *Delta Brands, Inc.*, 344 NLRB 252, 253, (2005), citing *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989).

Section 102.69(a) of the Rules provides that when filing objections to an election, a party must also file a written offer of proof in the form described in Section 102.66(c) of the Rules. Section 102.66(c) specifies that offers of proof shall identify each witness and summarize the testimony of that witness. With regard to processing objections, Section 102.69(c)(1)(i) of the Rules provides that if the Regional Director determines that the evidence described in the offer of proof would not constitute grounds for setting aside the election if introduced at a hearing, the Regional Director shall issue a decision disposing of the objections and a certification of results of election, including a certification of representative, where appropriate. The Board recognizes that the objecting party bears the burden of furnishing evidence or a description of evidence that, if credited at hearing, would warrant setting aside the election. *Jacmar Food Service Distribution*, 365 NLRB No. 35, slip op. 1, fn. 2 (2017), citing *Transcare New York, Inc.*, 355 NLRB 326 (2010). The Board considers the following factors to determine whether conduct reasonably tended to interfere with free choice: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear amongst employees in the voting unit; (3) the number of employees in the voting unit who were subjected to the misconduct; (4) the proximity of the misconduct to the date of the election; (5) the degree to which the misconduct

persists in the minds of employees in the voting unit; (6) the extent of dissemination of the misconduct to employees who were not subjected to the misconduct but who are in the voting unit; (7) the effect (if any) of any misconduct by the non-objecting party to cancel out the effects of the misconduct alleged in the objection; (8) the closeness of the vote; and (9) the degree to which the misconduct can be attributed to the party against whom objections are filed. *Taylor Wharton Division*, 336 NLRB 157, 158 (2001), citing *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986).

THE OBJECTIONS

OBJECTION 1: In this objection and supporting offer of proof, the Union alleges that beginning on January 14, 2021, and continuing thereafter, including after the filing of the Petition, the Employer discriminated against employees because of their union activity and choice of union representative by announcing and then on February 7, 2021, implementing a market rate wage adjustment that increased hourly base wages to at least $15/hour for all hourly employees except those represented by the Union.

The Union's pre-critical period objection refers to the Employer's decision to raise the minimum wage of its employees working at HCA-affiliated[3] facilities throughout the Kansas City metro to $15.00 an hour. The Union alleges that the Employer's announcement that the market rate wage adjustment would apply to only non-union hourly employees and the subsequent implementation of that adjustment only for non-union hourly employees was discriminatorily motivated. As evidence of discriminatory motive, the Union asserts, in part, that the Employer's actions in 2021 deviated from its past practice of offering these market rate wage adjustments to unit employees during the term of the collective-bargaining agreement. In the alternative, the Union asserts that the Employer's actions were "inherently destructive" of bargaining unit employees' Section 7 rights. The Union contends that the Board may consider this conduct because it lends meaning to and dimension to related post-petition conduct and because this conduct continued into the post-petition period.

The Employer insists that business reasons motivated the implementation of the market rate wage increase at its HCA-affiliated hospitals in the Kansas City area. The Employer states that it elected not to implement the market rate wage increase for unit employees employed at Research Medical Center and Menorah Medical Center because the Employer and Union were engaged in ongoing negotiations for successor contracts at both locations Finally, the Employer notes that the implementation of the wage adjustment at multiple facilities was not inherently destructive of the Section 7 rights of employees at one of two facilities where the Union represented employees.

The Petitioner argues that this pre-petition conduct at issue was lawful and that the objection should be overruled because it involves pre-petition conduct. Specifically, the Petitioner asserts that the alleged conduct does not fall within any of the exceptions to the Board's rule, as set forth in *Ideal Elec. Mgf. Co.*, 134 NLRB 1275 (1961), that it will only consider objectionable conduct occurring during the critical period. The Petitioner notes that the

[3] The Employer is part of the HCA Midwest healthcare network in the Kansas City metro area.

announcement and implementation of the market rate wage increase occurred well before the critical period which started on March 31, 2021, and that it does not add any meaning to any post-petition conduct of the Employer.

The Region concluded the Employer's announcement and implementation was not discriminatorily motivated, as alleged. The fact that an employer makes different offers or provides different benefits for represented and non-represented employees does not, standing alone, demonstrate unlawful motive. *See Shell Oil*, 77 NLRB 1306 (1948) (finding employer's implementation of new wages and benefits only for unrepresented employees to be lawful); *see also Sun Transport*, 340 NLRB 70 (2003). In *Sun Transport*, the Board concluded that the employer's offer during negotiations of less severance pay to union-represented employees than it was offering to unrepresented employees was made in an effort to induce concessions as part of the give-and-take during negotiations over a comprehensive agreement. 340 NLRB at 72. The Board distinguished the employer's actions from situations in which an employer terminated *existing* benefits as a bargaining tactic. "In accordance with these principles, the Board has found that '[w]here an employer withholds from its represented employees an existing benefit (i.e., an established condition of employment), such conduct is inherently destructive.'" *Viejas Band of Kumeyaay Indians*, 366 NLRB No. 113, slip op. at (June 21, 2018) (citing *Arc Bridges, Inc.*, NLRB 1222, 1223 (2010)). As noted by the Board in *Arc Bridges, Inc.*, "an employer may, as part of a bargaining strategy, withhold from represented employees a wage increase granted to unrepresented employees, providing the withholding is not discriminatorily motivated." 355 NLRB at 1223.

The investigation into the Union's objection failed to establish that the Employer's actions in announcing and implementing the market rate wage increase for its non-unit employees were discriminatorily motivated. Any previous decisions by the Employer to implement a market rate wage increase for unit employees were an exercise of the Employer's discretion, as provided for in the terms of the collective-bargaining agreement, and nothing in the existing agreement required the Employer to exercise that discretion again. Moreover, contrary to the Union's assertion, the evidence failed to establish the implementation of market rate wage adjustments during the term of a contract had occurred with such frequency to be considered a past practice or an existing benefit. The investigation failed to disclose other evidence that supported the Union's allegation that the Employer's actions were discriminatorily motivated.

Likewise, the Region concluded that the Employer's actions, as described in the objection, were not "inherently destructive" of employees' Section 7 rights. The Board has recognized that some employer conduct is so "inherently destructive" of employee interests that it may be deemed proscribed by Section 8(a)(3) even absent proof of an underlying improper motive. *Great Dane Trailers*, supra; *NLRB v. Erie Resistor Corp*., 373 U.S. 221, 228 (1963). Even if an employer's conduct is inherently destructive, the Board must weigh the asserted business justification against the invasion of employees' rights to determine whether the employer violated the Act, as alleged. *International Paper Co.*, 319 NLRB 1253, 1267 (1995), enf. denied on other grounds, *International Paper Co. v. NLRB*, 115 F.3d 1045 (D.C. Cir. 1997). Using the principles set forth by the Board in *International Paper Co.*, the evidence does not weigh in favor of finding that the Employer's decision to withhold the market rate wage increase was inherently destructive of employees' Section 7 rights.

It is the Board's long-held rule that generally only activity within the critical period may provide a basis for overturning election results. *Ideal Electric & Manufacturing Co.*, 134 NLRB 1275 (1961); *International Paper Company*, 313 NLRB 280 (1993). The critical period is defined as that period between the filing of the petition and the date of the election. *Ideal* Electric, 134 NLRB at 1278. There are limited exceptions to this rule, where the prepetition conduct is: (1) "truly egregious" such as threats of violence; (2) a promise of a benefit; or (3) when such conduct "adds meaning and dimension to related post-petition conduct." *MEK Arden LLC*, 365 NLRB No. 109 (2017) (citing *Servomation of Columbus*, 219 NLRB 504, 506 (1975); *Royal Packaging Corp.*, 284 NLRB 317 (1987); *Dresser Indus.*, 242 NLRB 74 (1979)).

In the instant case, the critical period runs from March 31 through June 14, 2021. The Union asserts that this pre-petition conduct should be considered objectionable because it lends meaning and dimension to the related post-petition conduct, including Employer communications regarding the market rate wage increase that occurred after the filing of the petition. *See Dresser Industries*, 242 NLRB 74 (1979). The Region concluded that the announcement and implementation of the market rate wage adjustment does not fall within the exceptions to the general rule set forth in *Ideal Electric*. The Employer's communications regarding the market rate wage increase which occurred after the filing of the petition is a separate and distinct issue from the announcement and implementation of the wage increase for non-union employees and the alleged objectionable conduct is not necessary for adding meaning and dimension to post-petition conduct.

Accordingly, I will overrule Union's Objection 1.

OBJECTION 2: In this objection and offer of proof, the Union alleges that beginning on or around January 14, 2021, and continuing thereafter, including on January 29, on February 11, and after the filing of the petition, the Employer, through CEO Ashley McClellan, threatened and created the sense of futility, denigrated the Union's status of collective bargaining representative, misrepresented negotiations, and undermined employees' confidence in the Union, by sending a series of communications to all bargaining unit employees incorrectly and falsely blaming the Union for employees not receiving the market rate wage adjustment to $15 per hour.

The Union's pre-critical period objection stems from email communications sent by the Employer to unit employees on January 29 and February 11, 2021, regarding the status of bargaining and the market rate wage increase. The Union argues that the emails misrepresented the Union's bargaining position and undermined the Union by stating that it was the Union who was preventing implementation of the market rate wage adjustment.

The Employer and Petitioner each contend that these emails were factual bargaining updates and protected speech within the meaning of the Act.

The Region concluded the Employer's email communications to employees on January 14, 2021, January 29, 2021, and February 11, 2021, did not constitute objectionable conduct as alleged. The investigation disclosed insufficient evidence to support the Union's assertion that the Employer blamed the Union for the fact that unit employees had not received market rate increases or that the Employer unlawfully misrepresented the Union's bargaining positions.

Rather, the evidence revealed that the Employer communicated to employees that the Union had requested the adjustment be implemented while the parties were still engaged in bargaining for a successor contract and that the Employer declined that request because it wished to reach agreement on a total contract.

Accordingly, I will overrule Union's Objection 2.

OBJECTION 3: In this objection and offer of proof, the Union alleges that on or about March 4, 2021, the Employer, through Cafeteria Supervisor Joel Morgan, at a meeting of dietary employees in the cafeteria, promoted and provided unlawful assistance relating to the collection of signatures and support for the decertification petition by telling employees when and where they could sign the petition, by stating that the Employer was no longer going to deduct dues from employee paychecks because the Union was bargaining in bad faith, and denigrating and undermining the Union by blaming the Union for employees not receiving a market rate wage adjustment to $15 per hour.

The Union's objection stems from alleged statements made by Supervisor Joel Morgan during a meeting he held on March 4, 2021, with bargaining unit employees in the Food Services Department. During the meeting, the Morgan is alleged to have told employees that until a new contract was signed, employees would no longer be charged union dues because the hospital didn't feel that it was fair to employees to continue to pay for dues because the hospital didn't feel that the union was bargaining in good faith. Morgan is then alleged to have addressed questions about the circulation of the decertification petition, telling employees that he had heard they would be in the cafeteria that day at 1:00 gathering signatures. When employees asked questions about the status of raises, Morgan allegedly explained that in order for raises to go into effect there had to be a signed contract."

The Employer denies that Morgan made any of the statements as alleged. The Employer also asserts that the objection should be overruled because it does not relate to post-petition conduct. The Petitioner likewise argues that the objection should be denied because it does not fall within the exceptions to the general rule set forth in *Ideal Electric*, supra.

The Region concluded that Morgan's alleged statements to employees do not constitute objectionable conduct. In *Washington Street Foundry*, the Board summarized various tests that had been previously used to determine whether actions by employers related to decertification efforts violate Section 8(a)(1) of the Act. 268 NLRB 338, 339 (1983). In particular, the Board identified one such test as asking "did the employer lend more than minimal support and approval to the securing of signatures and the filing of the [decertification] petition." *Washington Street Foundry*, 268 NLRB at 339 (citing *Placke Toyota, Inc.*, 215 NLRB 395 (1974)). In concluding that the employer had lent more than minimal support and approval to the securing of signatures for the decertification petition, the Board found that the employer put its "imprimatur upon the petition" by permitting it to be circulated on the employer's letterhead and by giving the "petition its open support . . . by allowing it to remain for several days" on the supervisor's desk. *Placke Toyota, Inc.*, 215 NLRB at 395. The evidence disclosed in the instant case falls well short of that described by the Board in *Placke Toyota*. Moreover, contrary to the Union's assertions and as set forth below, Morgan's statement about when and where to sign the petition does not come in the midst of other a number of other unfair labor practices. *Cf. Wire Products Mfg. Co.*,

326 NLRB 625, 626-27 (1998). Finally, when evaluated in context, Morgan's statement about when and where the petition would be available to sign does not constitute more than ministerial assistance nor would it have a tendency to interfere with the free exercise of rights.

The Region concluded that the evidence does not support the Union's allegation that Morgan blamed the Union for the lack of raises. Rather, Morgan's statement about wages was specifically tied to the bargaining process.

Finally, the Region concluded that Supervisor Morgan's statement regarding dues deductions exceeded the scope of protection afforded by Section 8(c) of the Act. Although it is the Region's conclusion that Supervisor Morgan's statement violates Section 8(a)(1) of the Act, the statement does not fall under any of the exceptions to the general rule set forth in *Ideal Electric*, supra.

Accordingly, I will overrule Union's Objection 3 in its entirety.

OBJECTION 4: In this objection and offer of proof, the Union alleges that in early April 2021, the Employer threatened employees, made misrepresentations about bargaining, and denigrated the Union, by manager Sarah Smith telling a bargaining unit employee that if employees voted to keep the Union, and they were behind on their dues, then the Union would go back and recover all back dues owed.

The Union presented evidence that constituted hearsay with respect to the discussion held between Manager Smith and a bargaining unit employee. The Employer denied that any such statements were made. The investigation failed to produce any additional non-hearsay evidence that would support the Union's objection.

Accordingly, I will overrule Union's Objection 4.

OBJECTION 5: In this objection and offer of proof, the Union alleges that in April 2021, following the filing of the petition, the Employer interrogated a bargaining unit employee regarding their support of the Union, denigrated the Union's status of collective bargaining representative, inaccurately blamed the union for the employees not getting the market rate wage increases, and undermined employees' confidence in the Union by EVS manager Steve (last name unknown) and a female Employer executive asking the employee how they were going to vote, telling the employee the Union took too long to get the employees their wages and bonuses, and that saying it was the Union holding the wages and benefits back. The same supervisor and female executive approached other unit employees around the same time, making comments of a similar nature.

The Union alleges that in April 2021 EVS Manager Steve Echols and VP of Operations Portia Katsigiannis approached a unit employee in the X-Ray area. The Union contends that the alleged objectionable conduct, as set forth above, occurred during the conversation that transpired.

The Employer admits that Manager Steve Echols and Vice President of Operation Patra Katsigiannis made the rounds together in April for the purpose of talking to employees about the

upcoming election, but the Employer denies that either representative interrogated employees or denigrated the Union.

The investigation revealed that Katsigiannis initiated the conversation by stating that she heard the vote was about to start and then asked the employee who they would vote for and whether they would vote yes or no for the Union. When the employee answered that they would vote for the Union, Katsigiannis asked why the employee would vote yes.

The Region concluded that Katsigiannis's interaction with the employee constituted an unlawful interrogation under Board law. "The relevant test is whether, under all the circumstances, the questioning would have reasonably tended to restrain or coerce an employee in the exercise of union or other protected concerted activity." *Shamrock Foods Co. & Bakery, Confectionery, Tobacco Workers & Grain Millers Int'l Union, Local Union No. 232, AFL-CIO-CLC*, 366 NLRB No. 117 (June 22, 2018) (citing *Rossmore House*, 269 NLRB 1176 (1984, affd sub nom. *Hotel Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Although Katsigiannis's questioning of the employee amounted to a violation of Section 8(a)(1) of the Act, the Region did not find that the evidence warrants setting aside the election. While the type of interrogation made by Katsigiannis would likely interfere or restrain unit employees in the exercise of Section 7 rights, the witness was unable to provide evidence that would establish to what extent the interrogation was disseminated.

Contrary to the Union's allegation, the investigation did not disclose evidence that the participants to the conversation discussed the market rate wage increase. Nor did the investigation reveal that the Employer representatives stated that the Union took too long to get employees wage increases or that the Union was to blame for holding back wages and benefits. Rather, the evidence established that the Katsigiannis' statement about wages was an accurate explanation of what occurred during bargaining.

Accordingly, I will overrule Union's Objection 5 in its entirety.

OBJECTION 6: In this objection and offer of proof, the Union alleges that in April 2021, the Employer denigrated the Union's status of collective bargaining representative, emphasized the Employer's discrimination of employees, inaccurately blamed the union for the employees not getting the market rate wage increases, and undermined employees' confidence in the Union, by EVS Director Terry Engling holding a department meeting with EVS bargaining unit employees and telling them that the Union was costing the Hospital money and that other employees received raises and the Union was the one keeping the unit employees from getting their raises.

Although the Employer denies that Engling made the statements as alleged by the Union in its objection, the Employer admits that Engling spoke to employees at a monthly department meeting about the fact that employees at other HCA-affiliated hospitals had received the market rate wage adjustment prior to unit employees.

The investigation disclosed evidence that unit employees were told that non-Union employees in other departments had previously received a market rate wage adjustment to $15.00 an hour and that the Union was stopping unit employees from receiving that same raise.

However, even if this evidence was credited, the Region did not find such statements violated the Act where the parties had already reached agreement on a contract that included language about the basis for implementing the market rate wage increase. In addition, the evidence established that the Employer had previously notified employees that it was the Employer who had rejected the Union's request to implement the market rate wage sooner. In these circumstances, the Employer's statement does not interfere with laboratory conditions. The statement contains neither a threat of reprisal if employees vote to keep the Union nor a promise of benefit should they vote to decertify the Union. Finally, the investigation revealed no evidence that employees were told that the Union was costing the Employer money.

Accordingly, I will overrule Union's Objection 6 in its entirety.

OBJECTION 7: In this objection and offer of proof, the Union alleges that on or about May 13, 2021, the Employer interfered with Section 7 rights of employees and discriminatorily applied its uniform policy against employees who supported the Union, by Chef Supervisor Joel Morgan directing a bargaining unit employee to instruct another bargaining unit employee to remove a scrub hat with a pro-union message, in order to keep down trouble. The Employer's direction was in contravention to existing polices and/or established terms under the expired collective bargaining agreement and further contrary to how the Employer was treating employees wearing anti-union t-shirts.

The evidence disclosed during the investigation does not substantiate the Union's allegation that Morgan directed a bargaining unit employee to instruct another unit employee to remove a scrub hat with a pro-union message.

Accordingly, I will overrule Union's Objection 7.

OBJECTION 8: In this objection and offer of proof, the Union alleges that on May 17, 2021, Hospital CEO Ashley McClellen sent an email to bargaining unit employees that impliedly promised benefits by telling employees the Hospital wants to unite and build a stronger and better future.

The Union's objection arises from an email sent to unit employees by CEO McClellan in which she states, "We hope you were able to see firsthand our vision for the future of Research without the SEIU and how we can work together to make it a better place." The email concludes, "We look forward to uniting and building a strong and better future for RMC for generations to come."

The Employer admits to sending a flyer in which it told employees "[w]e believe we have a better future together without SEIU and their dues." The Employer, however, denies that this statement contains any general or specific promise of benefit.

The Petitioner contends that the Employer's statement was lawful because there was no promise of benefit.

As to the above-referenced email that forms the basis of this objection, I have concluded that the statement is too vague to conclude that the Employer was making any implied promise of

benefits to employees in exchange for decertifying the Union and the investigation failed to disclose additional evidence to support the Union's objection.

Accordingly, I will overrule Union's Objection 8.

OBJECTION 9: In this objection and offer of proof, the Union alleges that following the filing of the petition, and about the time the mail ballots were mailed to bargaining unit employees from the Region, Hospital CEO Ashley McClellen created a sense of futility, solicited employee grievances, denigrated the Union, undermined employee confidence in the Union, and impliedly promised employees better terms and conditions of employment if employees decertified, by a letter sent to all bargaining unit employees. Among other things, and without limitation, the Employer:

a. Created the sense of futility and undermined the Union by stating that bargaining unit employees were not having their voice heard with union representation;

b. Denigrated the Union, undermined employee confidence in the Union, created the sense of futility, and emphasized the Employer's discrimination of employees and impliedly threatened further discrimination if the Union won the election, by stating that Union-represented employees do not receive benefits until months later (in reference to the market rate wage adjustment to $15 per hour), and blaming such conduct on the Union for bargaining; and,

c. Solicited grievances and impliedly promised better terms and conditions of employment if employees decertified by stating that the Hospital would listen to employee concerns, and build a better future, while the Hospital refused to give the market rate wage adjustment to bargaining unit employees.

In support of its allegation, the Union submitted an undated letter that by its content indicates it was sent by CEO McClellan to bargaining-unit employees around the time that the ballots were mailed. In support of its allegation that the contents of the letter created a sense of futility about bargaining and organizing, the Union points to the portion of the letter which states, "For the first time since SEIU came to Research a decade ago, you have the opportunity to have your voice heard." In support of the second part of the Objection, the Union points to the portion of the letter in which the Employer wrote, "SEIU members have generally the same compensation and benefits as non-union colleagues. The difference is that since these changes have to be negotiated, SEIU members have received them months later, despite also paying costly union dues." Finally, in support of its Objection that the Employer solicited grievances with an implied promise to remedy, the Union points to the portion of the letter wherein McClellan writes, "I am committed to listening, partnering, and leading this organizing."

The Employer denies that its communications with employees violated the Act and asserts that its communications throughout the campaign were permissible under the standards set forth in *Gissel*. Likewise, the Petitioner asserts that the statements are lawful within the meaning of the Act.

The Region concluded that the Employer's letter did not violate the law, as alleged. As to the first part of the Union's objection, the statement does not rise to the level of objectionable conduct. The law is well established that employers who threaten employees with the futility of selecting a bargaining representative violate Section 8(a)(1). *See, e.g.*, *Wellstream Corp.*, 313 NLRB 698 (1994). However, in this instance, CEO McClellan's statement that employees have

the opportunity to have their voices heard for the first time in a decade falls short of a statement of futility.

Likewise, the Union's objection that McClellan made an implied promise of benefit is without merit. Although an employer is entitled to make comparisons between union and nonunion benefits, those comparisons may "depending on their precise contents and context, nevertheless convey implied promises of benefits." *See G & K Services*, 357 NLRB 1314, 1315 (2011). As an initial matter, the Union makes an inference about the contents of the comparison in its objection by alleging that McClellan is referring to the market rate wage increase; however, the letter does not say that. In this instance, McClellan's statement about the delay in receiving benefits does not convey an implied promise of better benefits if employees decertify the Union but is merely her opinion that it takes longer for employees to receive changes in benefits because of the negotiating process.

Finally, the third portion of the Union's objection that the Employer solicited grievances with an implied promise to remedy is also without merit. McClellan's statement that she is "committed to listening" does not contain an implied promise of benefit if employees decertify the Union. There is nothing in the context of the letter that would lead employees to believe that her commitment to those actions is dependent on the Union getting decertified.

Accordingly, I will overrule Union's Objection 9 in its entirety.

OBJECTION 10: In this objection and offer of proof, the Union alleges that following the filing of the petition and starting about the time the mail ballots were mailed to bargaining unit employees from the Region, the Employer solicited mail ballots and threatened surveillance by EVS manager Steve (last name unknown) and other EVS managers/supervisors telling bargaining unit employees on multiple occasions to come into work with their ballots for assistance.

The Union's objections stem from at least three conversations in which Employer representatives offered assistance to employees if they had questions about casting their ballots. The Union asserts that the Employer's offer to assist employees in filling out ballots is objectionable because it amounts to the solicitation of ballots and casts doubts on the secrecy of the election. Moreover, the Union contends that under *Professional Transportation, Inc.*, 370 NLRB No. 132 (June 9, 2021), it is contrary to Board law for an Employer to assist employees with handling and filling out ballots. Finally, because these statements were repeatedly made to bargaining unit employees, such objectionable conduct could have affected the outcome of the election.

The Employer admits that its representatives were provided communications for talking to employees about the election process and how to vote but denies that any representatives offered to assist employees in marking ballots. The Petitioner contends that even if alleged conduct occurred, it does not constitute unlawful solicitation pursuant to *Professional Transportation* because there is no allegation that the Employer offered to collect or requested to mail in the ballot, only an offer to assist employees with questions. The Petitioner argues that even if the Region concluded that the alleged conduct falls within the *Professional*

Transportation analysis, the Petitioner notes that per the same case, the objection must allege a determinative number of ballots affected, which it does not.

The Region concluded that the evidence does not support the allegation that the Employer solicited mail ballots or threatened employees with surveillance. Prior to *Professional Transportation*, the Board held that "when an election is conducted by mail ballot, . . . that a party engages in objectionable conduct if it collects or otherwise handles mail ballots. 370 NLRB at slip op. at *1 (quoting *Fessler & Bowman, Inc.*, 341 NLRB 932 (2004)). In *Professional Transportation*, supra, the Board took up the unresolved issue of whether a party engages in objectionable conduct by merely offering to collect an employee's mail ballot. *Id.* at *1. The Board resolved the matter left open after the *Fessler & Brown* decision and held that "it is objectionable for a party to engage in mail-ballot solicitation, but solicitation will be a basis for setting aside the election only where the evidence shows that a determinative number of voters were affected." *Id.* at *3. In analyzing the underlying facts, the Board in *Professional Transportation* concluded that the "appropriate standard is whether a statement could be reasonably interpreted as a ballot solicitation (an offer to collect the ballot)." *Id.* at *6. In concluding that petitioner's statement constituted clear evidence of solicitation, the Board focused in on the fact that the petitioner offered to help the employee get the ballot "sent back." *Id.* The Board noted that "[b]y contrast, simply asking if employees have received their ballots or offering to assist them with understanding the election instructions could not reasonably be interpreted as ballot solicitation." *Id.* at *6, n. 22. The Board's election instructions . . . do not prohibit parties from offering to help employees understand the election process. *Id.* Finally, the Board concluded that in determining whether mail ballot solicitation warrants setting aside an election, consideration will be given to the (1) number of employees whose ballots were solicited, (2) the number of unit employees who were aware of ballot solicitation, and (3) evidence that the party engaged in a pattern of solicitation. *Id.*

In this instant, the evidence submitted by the Union does not rise to the level of objectionable conduct. Even if credited, the evidence indicates that the Employer was offering to assist employees who had questions about how to fill out the ballots. The evidence does not establish that the Employer offered to collect and return the ballots.

The Union also alleges that the Employer created an impression of surveillance by offering to assist employees with filling out their ballots. The standard for determining whether the Employer engaged in unlawful impression of surveillance is whether an employee could reasonably conclude from an employer's statement that protected activities were being monitored. *Walmart*, 368 NLRB No. 146 (December 16, 2019) (citing *New Vista Nursing & Rehabilitation*, 358 NLRB 473 (2012) (noting the standard is met "when an employer reveals specific information about a union activity that is not generally known and does not reveal its source"). In this instance, no impression of surveillance is being created. The Employer's ability to "surveil" employees voting activities would require employees to take the Employer up on its offer of assistance. In this case, where the activities of both parties would be open and apparent, employees are not having to conclude that their protected activities are being monitored.

Accordingly, I will overrule Union's Objection 10.

OBJECTION 11: In this objection and offer of proof, the Union alleges that in early May 2021, the Employer denigrated the Union's status of collective bargaining representative, emphasized the Employer's discrimination of employees, undermined the employees' confidence in the Union, and impliedly promised benefits by VP of Operations Patra Katsigiannis telling the unit employee that other HCA hospital employees received raises before the employees and that the Hospital could do more for the employees.

The Union's Objection refers to a conversation between an employee and Vice President of Operations Patra Katsigiannis. Katsigiannis is alleged to have told the employee that the hospital could do more for employees and that employees would have gotten their raises a lot sooner.

The Union contends that Katsigiannis' statements to employees were unlawful because she blamed the Union for employees not receiving the market rate wage adjustment. Moreover, the Union asserts that Katisigiannis' statement constitutes an implied promise of benefit by saying that the Hospital could improve working conditions without the Union. The Employer denied that Katsigiannis made the communications, as alleged.

Even if Katisgiannis made the statements as alleged, the Region concluded that the statements contained no implied promise of benefit because there was no mention of the decertification vote when mentioning that the Employer could do more. Likewise, any statement that the employees at other facilities received their wage increases sooner was a statement of fact and the investigation of this conversation produced no evidence that the Employer faulted the Union for that fact.

Accordingly, I overrule Union's Objection 11.

OBJECTION 12: In this objection and offer of proof, the Union alleges that in early May 2021, the Employer threatened and created a sense of futility, denigrated the Union's status as collective bargaining representative, and undermined employees' confidence in the Union, by Hospital representative Leo (last name unknown) holding a meeting with bargaining unit employees and telling them to vote how they wanted to vote but the Hospital was going to do what it wanted to do anyway.

The Union's Objection is based on a meeting held by Leo Arias with three bargaining unit employees. Arias is alleged to have told three employees that whether they want to be part of the Union, the Employer was going to do what it wanted to do anyway. The Union contends that Arias's comment sent a message to employees in attendance that the Employer was in control of their working conditions and whether the Union remained would not change anything. The Employer denied that Arias made the statement, as alleged.

The Region has concluded the alleged statement constitutes a statement of futility within the meaning of the Act. However, the Region's investigation failed to establish that the statement was disseminated. As such, it is virtually impossible to conclude that in a bargaining unit of 658 eligible employees that the statement to three employees would have affected the results of the election. *See Caron International, Inc.*, 246 NLRB 1120, 1121 (1979).

Accordingly, I will overrule Union's Objection 12.

OBJECTION 13: In this objection and offer of proof, on multiple occasions in April and May 2021, the Employer denigrated the Union's status of collective bargaining representative, emphasized the Employer's discrimination of employees, blamed the Union for the employees not getting the market rate wage increases, and undermined employees' confidence in the Union, by Chef Supervisor Joel Morgan and Executive Chef Ryan (last name unknown) holding mandatory meetings and telling employees that decertification was the best chance to get rid of the Union and that employees would have received the $15/hour raise without the Union and blaming the Union for the employees not getting their raises earlier.

The first part of the Union's Objection is based, in part, on a meeting during which the Union alleges that employees told by supervisors and managers in the Food Services Department that decertification was the best chance to get rid of the Union. The second part of the Union's Objection arises from a second and separate meeting during which employees were allegedly told that the market rate wage increase to $15 an hour came from the Employer and not the Union.

The Employer admits that supervisors in Food Services held monthly meetings and daily huddles with bargaining unit employees, but the Employer denies that the alleged unlawful statements were made.

The Region concluded that the evidence disclosed during the investigation did not support the Union's allegation that employees were told that decertification was the best way to get rid of the Union. As to the second part of the objection, the Region concluded that even if the evidence provided by the Union was credited that the statement, as alleged, does not constitute objectionable conduct. At the time the alleged statement was made, the parties had reached agreement on a successor collective-bargaining agreement, including on the term that provided for implementation of the market rate wage increase, and employees had multiple ways of assessing the validity of the Employer's statement.

Accordingly, I will overrule Union's Objection 13.

OBJECTION 14: In this objection and offer of proof, the Union alleges that at all times since the filing of the Petition, the Employer violated the Section 7 rights of employees and discriminatorily applied its uniform policy and non-solicitation policy in favor of employees who opposed the Union and against employees who supported the Union. Specifically, the Union contends that the Employer permitted bargaining unit employees to wear anti-union t-shirts including while working and in working areas where employees work and/or where patients seek care in contravention to existing policies and practices and/or instructions to employees that they could only wear Hospital uniforms when working and in areas where patients seek care and not t-shirts with non-Hospital logos or writing.

The Union's objection is based on events occurring during the week of April 17, 2021, during which more than one employee was observed wearing a t-shirt with anti-union sentiment on the work floor. In support of its objection, the Union points to other evidence showing that employees supporting the decertification petition were allowed to wear anti-union t-shirts in the

cafeteria and that these same employees were observed in the hallways wearing these anti-union t-shirts. The Union contends that this evidence supports the contention that the Employer was disparately enforcing its uniform policy by allowing employees to wear anti-union shirts contrary to the Employer's uniform policy.

The Employer denies that its uniform policy was disparately enforced. The Employer contends that any employees who wore anti-union t-shirts did so while in off-duty status. The Petitioner admits that it had a few t-shirts made after the decertification petition was filed and that the shirts were worn by employees who were in off-duty status.

The Region concluded that the Union's evidence failed to establish disparate enforcement of the policy. The investigation failed to disclose evidence that the Employer was aware that employees were wearing anti-union clothing during work hours and in work areas. Moreover, the investigation disclosed no evidence that the Employer attempted to enforce the policy against employees who were wearing clothing in support of the Union.

Accordingly, I will overrule Union's Objection 14.

OBJECTION 15: In this objection and offer of proof, the Union alleges that at all times since the filing of the Petition, the Employer violated the Section 7 rights of employees by discriminatorily applying its uniform policy against employees who support the Union, specifically when EVS Director Terry England and multiple EVS managers and supervisors, including Steve, Stephanie Martinez, Yolanda, Marilyn, and Lakeisha Young told bargaining unit employees that they were not permitted to wear any buttons.

The investigation disclosed that at all relevant times Article 34, Section 4 of the collective-bargaining agreement between the Union and Employer stated, "No clothing or uniform is to bear any logo, insignia, or slogan from another hospital that is not approved or sponsored by the Hospital. No Union insignia, button or object may be worn that contains derogatory content."

The Union's objection is based on testimonial evidence of alleged instances in which employees were instructed to remove buttons or stickers supporting the Union. The Union provided evidence that the Employer's restrictions on buttons began around the time that the Union gave employees buttons that said, "Hazard Pay Now." The Union contends that the button was not derogatory and that the Employer's statements that employees should remove buttons or stickers in support of the Union or prohibiting employees from wearing such buttons were a discriminatory enforcement of the contractual provision.

The Employer denies that it discriminatorily enforced policies related to buttons. The Petitioner provided evidence that employees had been allowed to wear buttons and badge holders with union insignia on them for the last decade and that the practice continued throughout the decertification campaign.

The Region concluded that a majority of the evidence submitted in support of this allegation was either outside the objections period, hearsay, or too vague to determine what button(s) employees had been instructed to remove. The Region did find one instance of an

employee being told to remove a button that clearly fell outside the restrictions negotiated by the parties. The button said, "I'm sticking with my Union." The Region concluded that the Employer committed a violation of the Act by prohibiting an employee from wearing that button, but the evidence showed that the prohibition was later rescinded and that there was no evidence that the prohibition was disseminated.

Accordingly, I will overrule Union's Objection 15.

OBJECTION 16: In this objection and offer of proof, the Union alleges the Employer has engaged in other acts and conduct destroying the laboratory conditions for an election.

Pursuant to Section 11392.5 of the Case Handling Manual Part II Representation Proceedings, any objections filed by a party "must contain a short statement of the reasons therefor." The Manual states "[o]bjections which are nonspecific, for example, which allege 'by these and other acts, etc.,' . . . are insufficient, should not be treated, and should be dismissed on their face." *Id.*

The Region concluded that the Union's Objection 16 fails to comport with the requirements of Section 11392.5 and is dismissed on its face.

CONCLUSIONS AND ORDER

Based on the administrative investigation, I conclude that the Union's objections, in their entirety, do not raise substantial and material issues affecting the outcome of the election, and they are hereby overruled in their entirety. Accordingly, I am issuing a Certification of Results of Election.

CERTIFICATION OF RESULTS

IT IS HEREBY CERTIFIED that a majority of the valid ballots have not been cast for any labor organization and that no labor organization is the exclusive representative of the employees in the bargaining unit described below.

> **Unit:** All full-time and regular part-time (including eligible per diem) employees employed by the Employer at its facilities located at 2316 East Meyer Boulevard, and 6601 Rockhill Road, Kansas City, Missouri, in one or more of the following combined units: 1) technical employees; 2) service and maintenance employees, but EXCLUDING skilled maintenance employees, managers, guards, and supervisors, as defined by the Act, confidential employees, physicians, professional employees, nurses and/or clinical educators, or coordinators, clinical nurse specialists, clinical coordinators, case managers/utilization review and/or discharge planners, nurse practitioners, accounting or auditing RNs, infection control/employees health nurses, risk management/performance improvement and/or quality assurance or quality management nurses, business office clerical employees, employees of outside registries and other agencies supplying labor to

the Employer, already represented employees and per diem employees who do not otherwise qualify as regular employees according to the NLRB.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.69(c)(2) of the Board's Rules and Regulations, any party may file with the Board in Washington, DC, a request for review of this Decision. The request for review must conform to the requirements of Sections 102.67(e) and (i)(1) of the Board's Rules and must be received by the Board in Washington by **February 23, 2022**. If no request for review is filed, the decision is final and shall have the same effect as if issued by the Board.

Pursuant to Section 102.5(c) of the Board's Rules and Regulations, a request for review must be filed by electronically submitting (E-Filing) it through the Agency's web site (www.nlrb.gov), unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining why the filing party does not have access to the means for filing electronically or filing electronically would impose an undue burden. Section 102.5(e) of the Board's Rules and Regulations does not permit a request for review to be filed by facsimile transmission. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated: February 8, 2022

/s/ Andrea J. Wilkes

Andrea J. Wilkes, Regional Director
National Labor Relations Board, Subregion 17
8600 Farley Street, Suite 100
Overland Park, Kansas

Attachments: Exhibit 1

MARILYN S. TEITELBAUM*
JAMES I. SINGER*
SALLY E. BARKER
DEAN L. CHRISTIANSON*
RHONA S. LYONS*
LORETTA K. HAGGARD*
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CHRISTOPHER N. GRANT*
CLARE R. BEHRLE*
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OF COUNSEL:
CHRISTOPHER T. HEXTER*
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June 21, 2021

VIA E-FILE

Mr. William B. Cowen, Acting Regional Director
National Labor Relations Board, Region 14
Subregion 17
8600 Farley Street, Suite 100
Overland Park, KS 66212

RE: Midwest Division – RMC, LLC (Case No. 14-RD-274944)

Dear Mr. Cowen:

On behalf of SEIU Healthcare, Missouri/Kansas Division ("Union") and pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board, the Union hereby files objections to the decertification election.[1]

1. Beginning on January 14, 2021, and continuing thereafter, including after the filing of the petition, the Employer discriminated against employees because of their union activity and choice of union representation by announcing and then on February 7, 2021, implementing a market rate wage adjustment that increased hourly base wages to at least $15/hour for all hourly employees except those employees represented by the Union. The Board may consider this conduct because it lends meaning to and dimension to related post-petition conduct and because this conduct continued into the post-petition period.

2. Beginning on or around January 14, 2021, and continuing thereafter, including on January 29, on February 11, and after the filing of the petition, the Employer threatened and created the sense of futility, denigrated the Union's status of collective bargaining representative, misrepresented negotiations, and undermined employees' confidence in the Union, by sending a series of communications to all bargaining unit employees incorrectly and falsely blaming the Union for employees not receiving the market rate adjustment to $15 per hour. The Board may consider this conduct because it lends meaning to and dimension to related post-petition conduct and because this conduct continued into the post-petition period.

[1] The decertification petition in this matter was filed on March 31, 2021. The election was conducted by mail from May 17, 2021, through June 14, 2021.

3. On or about March 4, 2021, the Hospital promoted and provided unlawful assistance relating to the collection of signatures and support for the decertification petition, by Cafeteria Supervisor Joel Morgan holding a department meeting with dietary bargaining unit employees, telling them when and where they could sign the petition, and incorrectly and falsely stating that the Union was bargaining in bad faith, and denigrating and undermining the Union by blaming the Union for employees not receiving a market rate adjustment to $15 per hour. The Board may consider this conduct because it lends meaning to and dimension to related post-petition conduct and because this conduct continued into the post-petition period, and further because this conduct taints the support of the petition in its entirety.

4. In early April 2021, the Employer threatened employees, made misrepresentations about bargaining, and denigrated the Union, by manager Sarah Smith telling a bargaining unit employee that if employees voted to keep the Union, and they were behind on their dues, then the Union would go back and recover all back dues owed.

5. In April 2021, following the filing of the petition, the Employer interrogated a bargaining unit employee regarding her support of the Union, denigrated the Union's status of collective bargaining representative, inaccurately blamed the union for the employees not getting the market rage wage increases, and undermined employees' confidence in the Union by EVS manager Steve (last name unknown) and a female Employer executive asking the employee how she was going to vote, telling her the Union took too long to get the employees their wages and bonuses, and that saying it was the Union holding the wages and benefits back. The same supervisor and female executive approached other unit employees around the same time, making comments of a similar nature.

6. In April 2021, the Employer denigrated the Union's status of collective bargaining representative, emphasized the Employer's discrimination of employees, inaccurately blamed the union for the employees not getting the market rage wage increases, and undermined employees' confidence in the Union, by EVS director Terry England holding a department meeting with EVS bargaining unit employees and telling them that the Union was costing the Hospital money and that other employees received raises and the Union was the one keeping the unit employees from getting their raises.

7. On or about May 13, 2021, the Employer interfered with Section 7 rights of employees and discriminatorily applied its uniform policy against employees who supported the Union, by Chef Supervisor Joel Morgan directing a bargaining unit employee to instruct another bargaining unit employee to remove a scrub hat with a pro-union message, in order to keep down trouble. The Employer's direction was in contravention to existing polices and/or established terms under the expired collective bargaining agreement and further contrary to how the Employer was treating employees wearing anti-union t-shirts.

8. On May 17, 2021, Hospital CEO Ashley McClellen sent an email to bargaining unit employees that impliedly promised benefits by telling employees the Hospital wants to unite and build and stronger and better future.

9. Following the filing of the petition, and about the time the mail ballots were mailed to bargaining unit employees from the Region, Hospital CEO Ashley McClellen created a sense of futility, solicited employee grievances, denigrated the Union, undermined employee confidence in the Union, and impliedly promised employees better terms and conditions of employment if employees decertified, by a letter sent to all bargaining unit employees. Among other things, and without limitation, the Employer:

a. Created the sense of futility and undermined the Union by stating that bargaining unit employees were not having their voice heard with union representation;

b. Denigrated the Union, undermined employee confidence in the Union, created the sense of futility, and emphasized the Employer's discrimination of employees and impliedly threatened further discrimination if the Union won the election, by stating that Union-represented employees do not receive benefits until months later (in reference to the market rate adjustment to $15 per hour), and blaming such conduct on the Union for bargaining; and

c. Solicited grievances and impliedly promised better terms and conditions of employment if employees decertified by stating that the Hospital would listen to employee concerns, and build a better future, while the Hospital refused to give the market rate adjustment to bargaining unit employees.

10. Following the filing of the petition and starting about the time the mail ballots were mailed to bargaining unit employees from the Region, the Employer solicited mail ballots and threatened surveillance by EVS manager Steve (last name unknown) and other EVS managers/supervisors telling bargaining unit employees on multiple occasions to come into work with their ballots for assistance.

11. In early May 20201, the Employer denigrated the Union's status of collective bargaining representative, emphasized the Employer's discrimination of employees, undermined the employees' confidence in the Union, and impliedly promised benefits by VP of Operations Patra Katsigiannis telling the unit employee that other HCA hospital employees received raises before the employees and that the Hospital could do more for the employees.

12. In early May 2021, the Employer threatened and created the sense of futility, denigrated the Union's status of collective bargaining representative, and undermined employees' confidence in the Union, by Hospital representative Leo (last name unknown) holding a meeting with bargaining unit employees and telling them to vote how they wanted to vote but the Hospital was going to do whatever it wanted to do anyway.

13. On multiple occasions in April and May 2021, the Employer denigrated the Union's status of collective bargaining representative, emphasized the Employer's discrimination of employees, blamed the union for the employees not getting the market rage wage increases, and undermined employees' confidence in the Union, by Chef Supervisor Joel Morgan and Executive Chef Ryan (last name unknown) holding mandatory meetings and telling employees that decertification was the best chance to get rid of the Union and that employees would have

received the $15/hour raise without the Union and blaming the Union for the employees not getting their raises earlier.

14. At all times since the filing the petition, the Employer violated the Section 7 rights of employees and discriminatorily applied its uniform policy and non-solicitation policy in favor of employees who opposed the Union and against employees who supported the Union. On multiple occasions, the Hospital permitted bargaining unit employees to wear anti-union t-shirts including while working and in areas where employees work and/or where patients seek care in contravention to existing policies and practices and/or instructions to employees that they could only wear Hospital uniforms when working and in areas where patients seek care and not t-shirts with non-Hospital logos or writing.

15. At all times since the filing the petition, the Employer violated the Section 7 rights of employees discriminatorily applied its uniform policy against employees who support the Union. On multiple occasions, EVS Director Terry England and multiple EVS managers and supervisors, including Steve (last name unknown), Stephanie Martinez, Yolanda (last name unknown), Marilyn (last name unknown) and Lakeisha Young, told bargaining unit employees they were not permitted to wear any Union buttons.

16. The Employer has engaged in other acts and conduct destroying the laboratory conditions for an election.

Respectfully submitted,

Amanda K. Hansen

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Union's Objections was e-filed with the National Labor Relations Board, Region 14 on this 21st day of June 2021 and that a copy was also sent via email to the following:

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Employer

/s/ Amanda K. Hansen

Exhibit B

2004 WL 6332114 (Arbitrator Submitted Award)

Arbitrator Submitted Award

In the Matter of the Arbitration Between INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 710, Union, and JEWEL FOOD STORES, Employer.

FMCS Case No. 03-12977
July 13, 2004

***1 Case Type: Labor**
Award Amount: $0.00
Award Date: July 13, 2004
Arbitrator: BEFORE: ARBITRATOR, BARRY E. SIMON
Representing the Local 710 of the International Brotherhood of Teamsters, hereinafter referred to as "the Union,' were: Patricia Collins, Esq. and Librado Arreola, Esq.
Representing JewelFood Stores, hereinafter referred to as "the Employer' or "the Company,' was: Sandy Zubik, Esq. Director, Labor Relations

Grievants: T R R T P

OPINION AND AWARD

The above identified matter was heard before the undersigned Arbitrator, selected by the parties through the Federal Mediation and Conciliation Service, on February 18, February 26, and April 5, 2003, in the offices of Jewel Food Stores Fresh Food Center, Franklin Park, Illinois.

Sworn testimony was given before the Arbitrator, and recorded and transcribed by a court reporter. In lieu of closing arguments, the parties filed post-hearing briefs that were received by the Arbitrator on June 1, 2004, at which time the record was closed.

Background: The Company is a major supermarket chain in Illinois, Iowa, Indiana and Wisconsin. It is a division of Albertson's, Inc. Among its facilities, the Company maintains a warehouse operation for fresh and frozen food in Franklin Park, known as the Fresh Food Center. Employees at this facility, including the grievants herein, are members of the bargaining unit represented by the Union. At all times relevant to this dispute, the effective collective bargaining agreement, hereinafter referred to as "the Agreement,' was the contract negotiated by the Chicago Truck Drivers, Helpers and Warehouse Workers Union for the period from April 1, 1998, through March 31, 2003. The Chicago Truck Drivers Union merged with Local 710 in 2000, and was in the process of negotiating a new collective bargaining agreement at the time these grievances arose. By agreement between the parties, the 1998-2003 contract had been extended during the negotiations. A new agreement was ratified in August 2003.

According to the Company, extra demands are placed upon the Fresh Food Center during the weekends prior to holiday weekends, such as Mother's Day, Memorial Day, Father's Day and Independence Day. It is during this time that large quantities of perishable products must be shipped to the stores. During this time, the Company says it limits vacation time and schedules more people to work. The Company avers it experienced a large number of employees calling in to report they would not be at work on Friday, May 16, 2003. Additionally, the Company says there were a significant number of employees who went home early. This situation, says the Company, prevented the Fresh Food Center from completing all of its scheduled work. As a result, management and loss prevention personnel interviewed the employees who called off that weekend. Management's intent was to determine if there had been concerted activity resulting in a work slowdown. Grievants T and R, who were among the absent employees, were placed on indefinite suspensions for failing to cooperate with the investigation. [1] Both employees filed grievances on May 21, 2003, seeking pay for all time lost.

***2** During the weekend from Friday, June 13, through Sunday, June 15, 2003, the Company says it again experienced high absenteeism in the Fresh Food Center. Management and loss prevention personnel again met with employees who had been absent and informed them they were required to provide documentation for their absences within twenty-four hours. When Grievants T, R, R, T and P did not provide documentation acceptable to the Company, they were placed on indefinite suspensions.[2] The five employees filed grievances on various dates, seeking lost wages and benefits.

The seven grievances were denied by the Company and progressed through the grievance procedure in accordance with the provisions of the Agreement. The parties being unable to reach resolution, the grievances were submitted to arbitration before the undersigned Arbitrator. The parties have stipulated that the grievances are properly before the Arbitrator and that he has jurisdiction to render a final and binding Award.

Statement of Issue: The parties concurred in the following Statement of Issue:

Did the Employer have just cause to suspend Grievants T and R in May 2003, and Grievants T, R, P, R and T in June 2003? If not, what is the appropriate remedy?

Relevant Contract Provisions:

ARTICLE III

UNION-MANAGEMENT RELATIONS

* * *

Section 3.2 Union Cooperation

The Union recognizes the responsibility assumed by it as the exclusive bargaining agent of the employees in the bargaining unit. It, therefore, pledges the full cooperation of its membership to promote the economic success of the Employer in order that the maximum opportunity for continuous employment, good wages and good working conditions may continue; and agrees that the employees covered by this Agreement shall diligently work for the best interests of the Employer in every way just and lawful, giving honest and diligent service to the Employer and to each other.

* * *

Section 3.5 Union Officials and Stewards

The Union shall have the right to designate a steward and/or assistant steward for each shift in each operation as set forth in Article IV, Section 4.6(B). The Union shall keep the Employer informed, in writing, as to the names of the stewards and assistant stewards.

The authorized Union business representatives shall be admitted to the Employer's warehouses during reasonable business hours for the purposes of adjusting disputes, investigating working conditions and ascertaining whether or not this Agreement is being observed. Such activity shall be conducted in such a manner as not to interfere with the orderly operation of the Employer's business, it being further agreed that lengthy discussions between employees and representatives of the Union, including the steward, or among themselves, concerning disputes shall not take place during working hours.

Prior to an employee being counseled either formally or informally, the Union steward or assistant steward will be notified and allowed to attend the counseling session unless the employee being counseled waives the right to representation.

Section 3.6 Discipline

***3** During an employee's trial period, an employee may be released from employment for any reason at the sole discretion of the Employer. After an employee has completed the trial period and has acquired seniority, such employee shall not be suspended or discharged without just cause.

In a situation where an employee is indefinitely suspended, if a decision is not rendered within ten (10) calendar days the employee will be returned to work and the Company will continue its investigation, but the investigation in no event will exceed thirty (30) calendar days from the day of indefinite suspension. After the investigation is completed a meeting will be held to review the facts and a final determination of the case will be made.

For production or attendance discipline only, an employee should receive counseling and/or written warning within three (3) working days of the incident provided the employee is at work following the incident otherwise the time period will be extended by the length of absence.

ARTICLE IV

WORKING HOURS AND OTHER CONDITIONS OF EMPLOYMENT

* * *

Section 4.9 Productivity

Before the Employer implements any change in productivity in any of the warehouse facilities in which the current Collective Bargaining Agreement applies, the Employer agrees to negotiate any change in productivity with the Union before implementation and to allow an outside independent specialist to review the standard after it has been implemented. The Employer reserves the right to implement the standard ninety (90) days after notice to the Union. The Employer recognizes the Union's right to arbitrate the reasonableness of the standard. The Union will have access to the Employer's production standard system.

It is agreed between the parties that productivity is based upon 95% per day, not 95% per store. No productivity warning will be given if: (1) an employee works less than four (4) hours on a standard job on any given day; (2) if an employee is within his scheduled workday and the Employer runs out of stores to allocate before six (6) hours of work on that day.

Productivity warnings shall be effective only for a period of one (1) year from the date issued.

ARTICLE XI

NO STRIKE: NO LOCKOUT

The Union and the Employer agree on the need for the continuance of their service to the public without interruption. Both recognize this objective as necessary to the security of the Employer and its people and specifically pledge themselves to help assure that security by using the procedures agreed upon between them for the adjustment of disputes and grievances in all cases

where there is any difference of opinion concerning the rights of either under this contract or the interpretation or application of any provision of it. Therefore, during the term of this Agreement there shall be no strikes, stoppage, diminution or suspension of work of any kind whatsoever on the part of the Union or its membership; nor shall there be any lockout on the part of the Employer.

ARTICLE XII

GRIEVANCES AND ARBITRATION

Section 12.1 Discipline and Discharge

***4** The Employer shall not discharge any employee without just cause. Warning letters shall be effective only for a period of one (1) year from the date issued. Any employee, other than employees in the trial period set forth in Article VIII, Section 8.2, may request an investigation of his discipline or discharge through the grievance procedure as follows:

1. Any grievance involving a claim of improper disciplinary action, suspension, or discharge must be presented in writing within fourteen (14) calendar days after the employee is notified of such discipline, suspension, or discharge for the grievance to be considered timely filed. Failure to file such written grievance within this fourteen (14) day period shall result in the grievance being deemed as untimely filed and the provisions of this Article shall not be invoked on the employee's behalf.
(a) Within five (5) working days after the filing of the grievance, the Union Steward and/or Union Field Representative shall meet with an Employer representative in an attempt to resolve the grievance. If the grievance is not resolved then...

(b) If deemed useful by either party, a designated Union and Employer representative shall meet within ten (10) calendar days after Step 1(a) above in an attempt to resolve the grievance. This meeting shall take place on the company premises. Each party will be allowed one (1) postponement at the 1 st step grievance level. If the grievance is not resolved, then...

(c) Within thirty (30) days after the completion of Step 1(a) above or within twenty (20) days after the completion of Step 1(b) above, whichever step is applicable, the grievance shall be submitted to a Joint Grievance Committee which shall consist of no less than two (2) Employer-designated representatives and two (2) Union-designated representatives. Each party will be allowed one (1) postponement at the Joint Grievance Committee level. The Joint Grievance Committee shall consider the grievance and shall render a resolution of the grievance, by majority vote, which shall be binding on the Employer, Union, and the employee. If the Joint Grievance Committee is deadlocked on the resolution of the grievance, then either the Employer or Union may invoke the arbitration procedure set forth in Step 12.2(1)(c) below.

The Joint Grievance Committee shall meet on a monthly basis at alternating locations between the Union and the Jewel Complex.

Section 12.2 Grievances Other Than Discipline or Discharge

* * *

(c) Arbitration. If the Union decides to arbitrate the grievance, then within seven (7) working days from the date of the Joint Grievance Committee deadlock, or within such additional time as agreed to by the Union and the Employer, then either the Union or Employer will request either the Federal Mediation and Conciliation Service or the American Arbitration Association to submit a list of seven (7) Arbitrators. The Employer and the Union shall each strike three (3) names, the Union striking the first name, and the person whose name remains shall become the Arbitrator. Selection of the Arbitrator must be done within seven (7) calendar days of receipt of the list. The arbitration must take place within sixty (60) calendar days after the selection

of the Arbitrator. If the selected Arbitrator cannot hear the grievance within sixty (60) calendar days, then the Arbitrator who was struck from the list last will hear the grievance. This procedure will continue until an Arbitrator is selected who will hear the grievance within sixty (60) days. All findings of the Arbitrator shall be final and binding upon the Union, Employer and complaining employee(s), if any. Briefs must be filed within seven (7) days of receipt of transcripts. The Arbitrator is prohibited from altering the terms and conditions of this Agreement. The fees and expenses of the arbitration shall be paid by the loser, unless the parties have agreed that the fees and expenses of the arbitration shall be equally shared, and the Arbitrator is required to determine who is the loser. Examples of reasonable fees are the Arbitrator's fee and per diem, court reporter fees, room rentals, and daily wages for necessary witnesses.

***5 Position of the Employer:** The Employer explains that these suspensions arose in the context of negotiations for a new collective bargaining agreement, which were the first with this Union subsequent to the merger with the Chicago Truck Drivers Union. According to the Employer, one area of change it desired was the practice of "early outs,' *i.e.*, an incentive that allowed an employee who completed eight hours of engineered work to leave as early as six hours and forty-five minutes into the shift, but be paid for the full eight hours. This practice, says the Employer, was leading to unsafe work practices and increased worker compensation costs as employees rushed to complete their work earlier than the time allotted. The Employer also contends the practice resulted in accuracy problems when employees did not check their work closely in a effort to be done more quickly. The Employer states it informed the Union in March and April 2003 of its intent to change the practice of "early outs,' and announced a change to the employees on May 6, 2003, to be effective on May 12, 2003. The Employer avers it prepared for a work stoppage or slowdown after this announcement. The Employer believed that the higher than normal levels of absenteeism on the weekends in question were related to its elimination of the "early out' practice, referring to the absences as "blue flu.' [3]

The Employer argues the suspensions were all proper because Grievants failed to comply with the established principle that an employee has an obligation to "obey now and grieve later,' unless doing so would result in injury or harm to an employee. These were situations, says the Employer, in which Grievants should have answered the questions in the interviews, or supplied the required documentation for their absences.

With regard to the first suspensions, the Employer asserts T and R were advised they would be suspended if they refused to cooperate in the investigation. The Employer cites arbitral precedent which it says recognizes the right of an employer to conduct an investigation, even when the employee may say or do something that would implicate himself or herself in the situation. In this case, according to the Employer, Grievants were asked to provide answers to seven questions. It denies they were in imminent physical danger by providing such information. Although the Employer says it told Grievants that a refusal to cooperate could lead to their suspension pending investigation, it contends Grievants refused to cooperate and were insubordinate in that refusal.

The Employer rejects Grievants' explanation that they were denied representation by someone from the Local 710 Union hall. It explains that a Union steward was present, and suggests that was adequate for the other forty-seven employees who were questioned. The Employer further cites *Barnard College*, 340 NLRB No. 106 (2003) as holding that the National Labor Relations Act does not entitle an employee to more than one union representative.

***6** The Employer asserts the second suspensions were also the result of Grievants failing to obey a reasonable directive. It says the employees who had been absent that weekend had met with members of management and were reminded of the requirement to provide medical documentation to support their absences. The Employer refutes the Union's contention that Grievants were not aware of this requirement, noting evidence that the requirement was a subject of discussion among the employees and was a topic discussed between the Company and the Union. It asserts each Grievant was advised to the requirement to get medical information, and was given twenty-four hours to provide the documentation. Each Grievant, says the Employer, failed and/or refused to provide any medical documentation the would have substantiated the reasonableness of an absence and thereby avoided a suspension.

The Employer argues the suspensions in these cases meet all of the standards of just cause as established by arbitrators and codified in Elkouri and Elkouri, *How Arbitration Works.* It says Grievants were on notice of the conduct expected of them, with T and R being told they were being insubordinate and that suspension would result if they did not cooperate in the investigation. Similarly, the Employer says each Grievant was given twenty-four hours to provide medical documentation to support the June absence. Before then, says the Employer, the employees were notified through the traditional posting of notices of the potential for medical documentation if abnormal absenteeism arose in the future. This directive, according to the Employer, was given to the Union in a letter dated May 20, 2003.

The Employer maintains it reasonably believed the increase in attendance problems, and the corresponding uncompleted work, were related to a concerted effort by a group of employees to cause a work slowdown. It contends deliveries were not being received and product was not being shipped on time, resulting in lost sales at the stores, increased scheduling expenses, and waste and spoilage of fresh foods in the warehouse. The Employer concludes the calling off sick had a major impact on business, necessitating taking appropriate action to investigate the possibility of a "blue flu.' It insists it had the right to demand cooperation with the investigation.

The Employer insists it conducted a thorough investigation in each case. It says it ensured that each employee was interviewed by a member of the loss prevention department, and that each interview was conducted using the same form interview sheet, with safeguards such as Union representation present. It denies there was any dispute as to the discussions with each Grievant, the fact that they were clearly placed on notice of their obligations, and the fact that they failed and refused to cooperate. The Employer further denies the use of loss prevention agents was inappropriate or uncharacteristic. It says the Union conceded that loss prevention does conduct various interviews. The Employer submits that having professional investigators present ensures a consistent, thorough investigation occurs.

***7** The Employer insists the disciplinary suspensions were reasonable. It says case law supports the notion that insubordinate actions such as these could result in terminations. The Employer states its ability to serve customers, and the employees' commitment not to engage in diminished work is of paramount importance. Moreover, the Employer notes Grievants took no action to mitigate their suspensions. It says T and R were returned to work after their first suspensions as soon as they met with management and answered the questions required of them. There is no evidence, says the Employer, that T or R attempted to meet with the Company any sooner, or that they changed their responses prior to the May 30, 2003, meeting. Similarly, the Employer contends none of the Grievants made any attempt to provide medical information that would have allowed him to return to work in a more timely manner. The Employer concludes each Grievant "had the key to his own jail,' but failed to use it.

The Employer argues it was justified in investigating a possible work slowdown or stoppage. It denies the Union's inference that the disciplinary suspensions were based upon Grievants' alleged participation in a "blue flu,' and insists they were the result of the Company's effort to investigate the situation. The Employer asserts it had a need to investigate whether there was any basis for its belief that there had been an unauthorized, unsanctioned work stoppage. It says such an investigation is expected in the world of labor relations and is one of the basic elements of any just cause discipline or discharge case.

Finally, the Employer disputes the Union's contention that the issue in this case is the change in the Company's absence policy. The Employer notes that Grievants were not disciplined for absences or a violation of the attendance policy. The Employer insists it has the right to protect itself from collective action that significantly adversely affects its customers, operation and reputation. It says the Company must be permitted to require medical documentation when significant absenteeism arises as an effective way to prevent or address significant diminutions of work that are prohibited by the Agreement.

The Employer concludes it has met its burden of proof that all of the suspensions were for just cause. It asks, therefore, that the grievances be dismissed.

Position of the Union: With respect to the first suspensions of Grievants T and R, the Union contends they were among a number of employees who were absent on the weekend following the Company's unilateral revocation of the "early out' policy. Despite

the Company's anticipation of what it called a “blue flu,‘ the Union denies there was any concerted activity in connection with these absences. Nevertheless, says the Union, the Company set up interviews between the employees and its loss prevention personnel in order to intimidate the employees.

The Union insists T was not certain of his rights during this interview, and had requested representation by a business agent or someone from the Union hall. When T refused to answer the questions, the Union says two supervisors were summoned. With four Company officials informing him that he would be suspended indefinitely if he did not cooperate, the Union says T answered all but the last question on the interview form. According to the Union, this question asked for speculation and would sound like a trick question to an average employee. The Union states T was then suspended for failing to answer one poorly drafted, speculative question.

***8** In R's case, according to the Union, two loss prevention employees and one supervisor interviewed him in a coercive environment. The Union notes that R was suspended when he refused to answer all but the first question.

Although the Union acknowledges an employee may have an obligation to cooperate in a reasonable investigation, it submits these interviews were not proper because they were coercive and were conducted simply to obtain a confession from the employees because the Company had no evidence without a confession. The Union further states T was set up by not allowing him to consult with the Union during the interview. The resultant suspensions, says the Union, were a further attempt to intimidate the employees.

The Union cites arbitral precedent that would limit the right of an employer to require an employee to answer questions during an investigation. According to the Union, the Company had no basis to believe that there had been a sick out during the May weekend. It says the absenteeism figures were not substantially higher that weekend. Instead, the Union says the Employer planned these interrogations simultaneously with increasing the work hours. The Union concludes that the suspensions of Grievants T and R were without just cause.

As for the second suspensions, the Union states Grievants were suspended indefinitely because they failed to produce doctors' notes within twenty-four hours. Nevertheless, when they were advised they were being returned to work, each Grievant was issued a letter for his personnel file stating that the reason for the suspension was a violation of Article XI of the Agreement (No Strike: No Lockout) because he had engaged in a blue flu action on the June and May weekends by being absent or leaving early. The Union points out that Grievants had never been told to provide medical documentation for their absences in May.

The Union argues the Employer has failed to meet its burden of proving not only that Grievants violated the no strike clause, but also that the penalty was appropriate. It explains that the essence of the no strike clause is that there must be concerted activity, be it a slowdown, a strike or a work stoppage. The Agreement, says the Union, does not clearly cover a concerted effort to call in absent. Even if it did, the Union contends the Employer must show the activity was concerted. The Union cites the definition of “strike‘ as found in Section 501 of the Taft-Hartley Act, as follows:
The term “strike‘ includes any strike or other concerted stoppage of work by employees... and any concerted slowdown or other concerted interruption of operations by employees.

According to the Union, the employees must work in concert toward a common goal. It defines a work stoppage as the use of economic pressure, whether through the use of a slowdown, work stoppage or otherwise, in an attempt by employees to achieve a common goal. A work stoppage, says the Union, is commonly understood as a way for either a union or a group of bargaining unit employees, who may or may not be together with the union, to affect adversely the profitability of a company in order to realize a common purpose.

***9** The Union disputes the data used by the Company to show there was a work slowdown by excessive absenteeism on either of the weekends in question. Not only does the Union question the accuracy of the data, it argues against comparing the 2003

statistics with those of 2002, contending they do not reflect the same conditions. The Union also argues there were no data presented to support the Employer's claim that there was a loss of productivity. It maintains that a failure to complete work when Grievants were not there is not the fault of the Grievants. Furthermore, says the Union, the Company had imposed its own slowdown when it changed the employees' hours, telling them they must take their breaks and were no longer permitted to leave early. According to the Union, there was no incentive to working fast, and the Employer did not want anyone performing in excess of the required amount of work. In essence, says the Union, the Employer asked the employees to take eight to ten hours to perform the work they used to finish in six to eight hours. The Union submits this change was the most important effect on productivity.

The Union next argues that requiring Grievants to submit medical documentation after the fact was unreasonable and contrary to the Agreement. It cites the no-fault attendance plan and a long standing practice of requiring a doctor's note only when the employee is absent in excess of three days. The Union states the Company considered the posting of a May 20, 2003, letter from Labor Relations Vice President W to W, Local 710's Secretary-Treasurer, to be its notice to the employees of its intent to require medical documentation. The Union, however, questions whether the letter was actually posted, and notes that the document the Company alleges was posted did not conform to the letter sent to Mr. W. It asserts the letter is not in the form of a notice to the employees, nor does it give an indication as to its source.

The Union further states the rule is unreasonable because it did not put employees on notice in advance as to what their obligations are. It says the rule is contingent upon a determination made after the fact, *i.e.*, medical documentation is required only "if an abnormally high amount of call-in absences, leave earlies, or tardiness reoccurs.' The Union points out that the attendance information would not be known to individual employees when they call off sick or leave early. The Union notes that the Company did not enforce the policy on June 6, 2003, when absenteeism was at the highest rate. Although the Company explained it did not have a productivity problem at that time, the Union notes that the rule is contingent upon an "abnormally' high amount of absence, and not on productivity problems.

The Union next claims the rule is unreasonable because it encourages employees to submit fraudulent medical documentation. If an employee did not see a doctor for a one or two day absence, the Union says the employee must then go to a doctor and ask for certification even though the doctor did not see the employee during the time of the absence.

***10** The Union also asserts the rule is a violation of the no-fault attendance policy, as contained in Appendix B of the Agreement. This policy, says the Union, assesses discipline based upon points accumulated "regardless of the type of incident.' The Union cites the testimony of Y, Director of Distribution Operations, that the no-fault attendance program did not require employees to be sick and that they were assessed points regardless.

The Union contends there is an undisputed practice of requiring medical documentation only for absences in excess of three days. This, says the Union, comports with provisions of the Family and Medical Leave Act that define a serious medical condition as, *inter alia*, an absence of more than three days with certain medical documentation.

The Union next argues that the penalty imposed in the second suspensions was unreasonable and was never communicated to the employees. The Union contends the employees should have been able to rely upon the point system contained in the no-fault attendance plan, which has numerous steps of progressive discipline prior to the issuance of suspensions. The Union also compares Grievants with other employees who were absent during this time and concludes the rule was not uniformly enforced across the workforce, with respect to both the interrogation process and the requirement to provide medical documentation.

Finally, the Union notes Section 3.6 of the Agreement permits the Employer to indefinitely suspend an employee for only ten calendar days. Thereafter, says the Union, the Employer must either make a decision or return the employee to work. In this case, the Union contends Grievants were suspended for thirteen days for their failure to document their absences.

For these reasons, the Union concludes Grievants were not suspended for just cause. It asks, therefore, that the grievances be sustained and that Grievants be made whole for all losses, including wages and benefits.

Discussion: The Arbitrator held three days of hearings in this case, with much of the testimony from both sides related to the nature of the bargaining that was occurring at the time the grievances arose, as well as a history of the "early out' policy, the changes made in the policy and the effect of those changes on the employees. While this evidence was interesting in that it set the stage for the grievances, it was, in actuality, immaterial in resolving the grievances that were before the Arbitrator.

There is no dispute the negotiations were contentious. The Employer presented its case to the Union that changes needed to be implemented to maintain the Company on a competitive level with non-union retailers such as Wal-Mart. One action the Company felt was necessary was the elimination of the "early out' policy that allowed employees to leave work before the end of the shift, and get paid for the entire shift, if the scheduled work was completed. The Union offered testimony that employees saw this as a distinct benefit that granted them more free time without diminishing their earnings. The Company, on the other hand, offered testimony that the policy resulted in lowered productivity because of errors and injuries incurred by employees hurrying to get the work done early. The Union characterized this elimination of the policy was a unilateral change in working conditions. [4]

***11** The propriety of the Employer's elimination of the "early out' policy is not an issue before the Arbitrator. The record reflects that grievances were filed in connection with this action, and they were settled at the time the new collective bargaining agreement was ratified. They were never presented before the Arbitrator.

It is undisputed that the elimination of the "early out' policy was not well received by the employees. Such a reaction was apparently anticipated by the Company, for when it announced the change, it reminded employees that the Agreement "prohibits any type of strike, stoppage, diminution or suspension of work or any other type of action,' and informed them that employees involved in these activities will be subject to termination of employment. [5] The day before the elimination of the policy was announced, Director of Labor Relations T, at the direction of W, sent an e-mail to O, attaching two questionnaires to be used if there was "blue flu' or a work slowdown. (Tr. p. 91; Er. Ex. 6) W testified that there had been rumors that such an activity was possibly developing. Although the change was not formally announced to the employees until May 6, 2003, it had been discussed during the negotiation sessions in April.

On the weekend before the Memorial Day weekend, the Employer contends a large number of employees either called off or left before completing their work. According to the Employer, 34 employees called off and 16 employees left early on Friday, May 16, and 30 employees called off and 22 employees went home early on Saturday, May 17. These figures were compared to 15 employees calling off on Friday and 19 employees calling off on Saturday the same weekend in 2002. [6] (Er. Ex. 2) Management felt this was a concerted effort on the part of the employees not to come in to work. Labor Relations was contacted for advice, and they directed that the employees who were absent be interviewed using the questionnaire that had been attached to the e-mail sent by T. Forty-nine employees were interviewed by personnel from the Company's loss prevention department, in the presence of the Union steward who was on duty at the time. Each employee was asked the seven questions on the questionnaire, as follows:

1. Why did you fail to work on _____?

2. Do you have proof to justify absence (if yes, need to produce by next scheduled work shift)?

3. Did you know other employees were not reporting to work?

4. Were you told or asked to not report to work by another employee or a union representative? (If so, by whom?)

5. Did you decide to not report to work because other employees were not reporting to work?

6. Was this a reaction against the Company stopping early outs?

7. Was this agreed upon with other employees or with a union representative? (If no, how do you explain the fact that many employees failed to work.)

Grievant T was interviewed on May 20, 2003, and initially refused to answer any of the questions. When he was told by Warehouse Superintendent K that he would be placed on indefinite suspension if he did not answer the questions, T answered the first question by stating he went home early on Friday and was off on Saturday because he was sick. He answered "No' to questions 2 through 6, and refused to answer question 7. At that point, T said he wanted Union representation. K responded that he had his Union steward present, but T said he wanted someone from the hall. When T continued to refuse to answer the seventh question, K placed him on indefinite suspension. (Tr. pp. 154-157) Grievant T did not testify, and the testimony of Warehouse Superintendent M stands unrefuted.

***12** Grievant R was interviewed on May 21, 2003, and refused to answer any of the questions. When he asked for someone from the Union hall, he was told that Union Steward M was there. When R continued to refuse to respond to the questions, M told him that he would be placed on indefinite suspension for failure to cooperate in an investigation. R again refused to answer any of the questions, and M suspended him. (Tr. pp. 162-164) Neither Grievant R nor M testified to refute M's testimony.

While Grievants' *Weingarten*[7] right to Union representative may have arisen during these interviews, there is no dispute that a duly certified Union Steward was present. The Union has cited no decisions of the NLRB or the courts that would give Grievants the right to demand a representative from the Union hall when the Steward is already present. Grievants offered no testimony as to why they felt their Steward was incapable of representing them, nor did they offer any other explanation for refusing to answer the questions.

Under the circumstances surrounding the absences on the weekend before Memorial Day, it was not unreasonable for the Employer to believe there might have been concerted activity, whether authorized by the Union or not. It had a right to conduct an investigation to determine if its suspicions were valid. It could require employees to answer these questions, which were not unreasonable. There is no evidence that the interviews were coercive or improper in any other manner. Forty-nine employees were called in for interviews, and forty-seven of them cooperated. Grievants T and R had no basis under the Agreement for refusing to cooperate. Nor did they have any basis for refusing under law. They were not privileged to rely upon the Fifth Amendment of the U. S. Constitution inasmuch as the Company is not a public body. Grievants were told, in no uncertain terms, what the result would be if they refused to answer the questions being asked of them. They continued to refuse in full knowledge of the consequences. The suspensions imposed were not unreasonable for this act of defiance, and shall not be overturned or modified by the Arbitrator. They were for just cause. The first grievances of Grievants T and R will be denied.

With regard to the grievances for the June suspensions, the Employer insists it put the employees on notice that they might be required to submit medical documentation in the event there would be an unusually high number of absences. It relies upon testimony that a copy of the May 20, 2003, letter from W to W had been posted on a bulletin board in the warehouse. This letter reads as follows:
RE: Illegal "Sick-Out' Activity/Jewel Food Stores Warehouse Employees

Dear Mr. W:

As I am sure you are aware, on Friday, May 16, 2003, fifty (50) Fresh Food Center Perishable and Frozen Food employees either called in sick or left work early. Normally, twenty-five (25) employees are absent on a Friday. This employee action represents a 100% increase for the day. On Saturday, May 17, 2003, fifty-one (51) Fresh Food Center Perishable and Frozen Food employees called in sick or left work early. Normally, twenty-one (21) employees are absent on a Saturday. This was over

a 140% increase in absenteeism. Employees also threatened on May 17th to cease working after eight hours even though our labor contract provides for mandatory ten-hour days when required.

***13** This "sick-out' activity was illegal strike activity in violation of Article XI of our Labor Agreement, which provides that there shall be "no strikes, stoppage, diminution or suspension of work of any kind whatsoever on the part of the Union or its membership.' This employee activity resulted in store delivery delays throughout Saturday and Sunday and adversely affected Jewel's business.

Jewel has an outstanding reputation in the Midwest area. Customers rely upon Jewel being in-stock for grocery products. The employees' actions harmed the in-stock condition of stores, caused additional expense to the business, and resulted in irreparable harm. The number of lost or disappointed customers at this time is not known. Of course, any additional sick-outs or other action in violation of Article XI will result in additional damages.

Employees who engage in illegal activity in violation of Article XI are subject to termination of employment. Medical documentation, acceptable to the Company, will be required for an absence if an abnormally high amount of call-in absences, leave earlies or tardiness reoccurs. We will also explore all legal remedies for injunctive relief and damages as deemed appropriate.

We seek your organization and the members (*sic*) cooperation in respecting Article XI of our agreement and the law.

According to Director of Operations Y, this letter was given to him by Labor Relations to post on the bulletin board. Although he did not personally post the letter, he testified that he saw it posted on one of the bulletin boards by the time clocks. [8] Although Business Agent K testified that he did not see the letter posted in the warehouse, he was never specifically asked about the bulletin boards by the time clocks. Based upon the record before him, the Arbitrator concludes the copy of the letter was posted.

Y acknowledged that the letter required medical documentation "only if the Company decides that the weekend had high absenteeism,' and that such a determination would be made after the fact. (Tr. p. 67) According to the Employer's data, there were 58 employees who called off on Friday, June 6, 2003, and another ten employees who went home early. On Saturday, June 7, 41 employees called off and three employees went home early. Forty employees called off on Sunday, June 8. This was the weekend before Father's Day. The Employer took no action in connection with these absences, despite the fact that more employees called off on these dates than had on May 16 and 17.

On Friday, June 13, according to the Employer, 36 employees called off and 13 more went home early. The following day, Saturday, June 14, 46 employees called off and seven went home early. All five Grievants were among the employees who were absent on at least one of these two days. They were, consequently, called in for meetings with either Superintendent M or Superintendent M. Also present at these meetings were a Union Steward and someone from Loss Prevention. On June 17, 2003, meetings were held with Grievants R and P, and they were told that they had twenty-four hours to provide medical documentation for their absences. Follow-up meetings were held on June 18, and when Grievants R and P stated they did not have any documentation for their absences, they were indefinitely suspended for violating Article XI of the Agreement. Similar meetings were held with Grievants R and T on June 18, and they were likewise suspended on June 19 for violating Article XI of the Agreement. Management met with Grievant T on June 30. At the follow-up meeting on July 1, T offered a letter from his wife, reading, "My husband was home June 12, 13 and 14. I took care of him.' This was found not to be acceptable, and T was also suspended indefinitely for violating Article XI of the Agreement.

***14** The Company's post-hearing brief suggests that Grievants were suspended for failing to provide medical documentation. At no point in its brief does the Company maintain that Grievants violated the No Strike provisions of the Agreement. Rather, it merely offers Article XI, in light of the negotiations history, as a basis for conducting its investigation of the employees' absences. In fact, the Company's brief states, "The Union misstates the background because each of the suspensions arose as

a result of the Company's attempt to investigate a potential blue flu situation, not as a disciplinary suspension based on the grievants (*sic*) alleged participation in a blue flu.' The Employer's brief, however, cannot change what occurred.

On June 17, 2003, the day the interviews of the employees who were absent over the weekend began, General Manager of Distribution O issued a memorandum to all warehouse and transportation employees represented by Local 710. The memo read as follows:

RE: ILLEGAL STRIKE ACTIVITY

On Friday, June 13th, we experienced over a 100% increase in call-offs and leaving early and on June 14th, up to a 200% increase in call-offs and leaving early in certain distribution areas. This activity resulted in store delivery delays.

Our labor contract provides there shall be "no strikes, stoppage, diminution or suspension of work of any kind whatsoever.' We have been in the process of investigating this activity. This action hurts customers through delayed store deliveries, jeopardizes our business and complicates the contract negotiation process.

Employees who engage in activity in violation of Article XI of our contract are subject to termination of employment. I am again reminding everyone that medical documentation, acceptable to the Company, will be required for an absence if an abnormally high amount of absenteeism arises. We also reserve the right to investigate alleged medical documentation. We encourage everyone to respect the law and cease engaging in improper "sick-out' or other similar activity. (underlining in original)

In connection with each of the suspensions M or M sent a memo to each Grievant's personnel file. Four of the memos were written on June 27, while the memo concerning Grievant T was dated July 3, 2003. The memo concerning Grievant R reads as follows:
On June 18, 2003 a meeting was held with R (associate), M (Union Steward), O (Jewel Albertsons Loss Prevention), and the undersigned (M). Mr. R was told he needed to provide documentation for his absence on Saturday, June 14, 2003. Mr. R was allowed 24 hours to provide the requested documentation.

On June 19, 2003 a follow-up meeting was held with R. During this meeting R Stated he didn't have any paperwork to excuse his absence. Mr. R was Indefinitely Suspended for Violation of Article XI of the Labor Agreement.

All of the other memoranda were substantially identical, except for the dates and persons present at the meeting. The memorandum regarding Grievant T also noted he produced a letter from his wife. Not one of these memoranda gave any indication the Grievants were suspended for failing to produce the required documentation.

***15** On July 2, 2003, M sent a memo to each Grievant. The memo addressed to Grievant R, which is representative of the other four, reads as follows:
On May 17th and again on June 13th you engaged in an illegal job action in violation of Article XI "No strike; No lockout' of the contract. On these dates you participated in a blue flu action when you left early or failed to report to work. This action resulted in diminution of work on May 17th and June 13th. The increase in absence compared to the same time last year was 140% for May 17th. On June 13th the increase in absence compared to the same time last year was 100%. On your second occurrence you were indefinitely suspended.

In resolution of your suspension you will be returned to work on July 2, 2003, without pay for the time you were suspended. Any further actions on your part that violates Article XI of the contract, including but not limited to stoppage, diminution, or suspension of work of any kind whatsoever, will result in the immediate termination of your employment.

While it may be true that Grievants could have avoided the suspensions if they had submitted medical documentation, as suggested by the Company, the fact remains that all of the Company's documents related to the suspensions state the reason as being a violation of Article XI of the Agreement. The Arbitrator must take this as the basis for the suspensions. The burden, then, is upon the Company to prove Grievants engaged in concerted activity when they were absent during the weekend of June 13 and 14. Although the timing of the absences, as well as the extent of absenteeism in the warehouse, may hint that there was concerted activity, the Company may not win its case solely upon supposition or inference. There has been no proof that Grievants did, in fact, absent themselves as part of some concerted activity. "In the case of an illegal strike, arbitrators will generally require the employer to base discipline on proof of each individual employee's involvement and degree of participation in the group activity.'[9] Here, the Company has not met the threshold burden of showing the absences were a group activity. All the Company has been able to prove is that Grievants, without any advance notice that they would be required to submit medical documentation for their absences on this particular weekend, were unable to procure such documentation, after the fact, within twenty-four hours.[10] The suspensions, therefore, were without just cause and must be rescinded.

The parties have, as part of their Agreement, a "loser pays' clause in the arbitration provision. Section 12.2 (c) of the Agreement requires the Arbitrator to determine who is the loser. In this case, the parties have presented seven individual grievances. The Union clearly lost the two grievances related to the May suspensions, and the Company clearly lost the remaining five grievances in connection with the June and July suspensions. Accordingly, the Arbitrator will direct that two-sevenths of the arbitration expenses will be assumed by the Union, and five-sevenths will be assumed by the Company.

Award:

***16** The Company had just cause to suspend Grievants T and R in May 2003. The grievances on their behalf are denied. The Company did not have just cause to suspend Grievants T, R, R, P and T in June and July 2003. The grievances on their behalf are sustained. The Company is directed to remove any references to these suspensions from Grievants' files, and to compensate them for earnings and benefits lost as a result of the disciplinary action. The Arbitrator will retain jurisdiction for thirty days from the date of this Award solely for the purpose of resolving any disputes regarding the computation of back pay. In accordance with the provisions of Section 12.2 (c) of the Agreement, the Union shall pay two-sevenths of the fees and expenses of the arbitration, and the Company shall pay five-sevenths of the fees and expenses of the arbitration.

BEFORE: ARBITRATOR, BARRY E. SIMON

Footnotes

1 T's suspension began on May 21, 2003, and R's suspension began on May 22, 2003. On May 30, 2003, the Company returned both employees to work after they completed the questionnaire used in the interview process.

2 T and R were suspended from June 20 to July 2, 2003, inclusive. R and P were suspended from June 19 to July 1, 2003, inclusive. T was suspended from July 1 to July 14, 2003, inclusive.

3 "Blue flu' is the term used by the Employer. In a labor context, it generally refers to a sick out conducted by police officers, who wear blue uniforms.

4 Local 710 President D testified as much when he explained he was referring to the "early out' policy in his June 27, 2003, letter to the membership, wherein he wrote, "The manner in which Albertson/Jewel has introduced unilateral

changes in the conditions of employment during the term of these negotiations is outrageous, as are the tactics in its discipline for absenteeism.' (Tr. pp. 416-419)

5 The Notice to "All Warehouse Associates' from General Manager of Distribution O, dated May 6, 2003, (Un. Ex. 1) read as follows:

> In our continuing effort to improve our operation and provide the Best in Class Service to our customers, Early OUT (*sic*) will be eliminated effective May 12th. By eliminating Early Out, it will provide us with the opportunity to assemble accurate pallets, make timely replenishments, load properly, eliminate off pallets, reduce associate accidents, provide a clean and damage free work environment. We expect our associates to take the appropriate breaks, and lunch periods each day. Every associate is required to take 2 ten-minute breaks and a thirty-minute lunch period during an 8-hour shift.
>
> Our focus as a distribution center is to provide our customers, with 100% on time deliveries, accurate and damage free goods. We only exist as a distribution center to service our customers.
>
> We expect our associates to continue to perform at 100% of standard. Associates will be paid based on the actual hours worked, not standard hours. Our Labor contract prohibits any type of strike, stoppage, diminution or suspension of work or any other type of action. If any employees are involved in these activities, they will be subject to termination of employment.
>
> If you have any questions see your supervisor.
>
> Thank You For Your Cooperation

6 The Employer did not have data for the number of employees who left before completing their work in 2002.

7 *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975).

8 The Union objected to the fact that the letter posted on the bulletin board was not a true and accurate copy of the letter that was actually sent to Mr. W. The only differences between the two letters are that they are on different letterheads and the copy posted on the bulletin board did not contain Mr. W's signature, or any other indication of authorship. The Arbitrator does not find these differences to be significant.

9 E & E, *How Arbitration Works, Sixth Edition*, (BNA 2003) p. 953

10 In this respect, it is significant that no documentation was required for absences the previous weekend, even though the warehouse experienced a greater level of absenteeism. While management might have the right to require medical documentation in certain instances, it must exercise such a right in a reasonable manner. In this case, it did not do so.

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